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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

IN RE APPEAL OF RONALD AND ANISSA COULTER, et al
AND THOMAS ROSTEK, et al

*Plaintiffs-Petitioners,*

IN RE APPEAL OF DOUGLAS SMITH,

*Plaintiff-Petitioners,*

IN RE APPEAL OF JOSEPH AND DONNA CORRIERE,

*Plaintiffs-Petitioners,*

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

*Defendant-Respondent,*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 96-3737, 96-3738, 96-3739

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IN RE RONALD AND ANISSA COULTER, et al, and THOMAS ROSTEK et al's APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

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IN RE DOUGLAS SMITH'S APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

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IN RE JOSEPH AND DONNA COPRIERRE'S APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

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SUR PETITION FOR REHEARING

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BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges

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The petition for rehearing filed by petitioners in the above captioned matters having been submitted to the judges who participated in the decision of this court and to all the other

available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

/s/
Circuit Judge

DATED: MAR 12 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3737, D-56-E
No. 96-3738, D-55-E
No. 96-3739, D-54-E

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IN RE RONALD AND ANISSA COULTERS',
et. al., and THOMAS ROSTEK'S et. al., APPEAL

IN RE DOUGLAS SMITH'S APPEAL

IN RE JOSEPH AND DONNA CORRIERES' APPEAL

---

PETITION FOR REHEARING IN BANC
OF ORDER DENYING
PETITIONS FOR WRITS OF MANDAMUS

---

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**IN THE UNITED STATES COURT OF APPEALS**
**for the Third Circuit**

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| IN RE<br>RONALD AND ANISSA COULTER,<br>et. al., and THOMAS ROSTEK et.<br>al.'s, APPEAL<br>Petitioners,<br>and, | ) | Docket No.<br>96-3737, D-56-E |
| IN RE DOUGLAS SMITH's APPEAL,<br>Petitioner,<br>and, | ) | Docket No.<br>96-3738, D-55-E |
| IN RE JOSEPH AND DONNA,<br>CORRIERES' APPEAL,<br>Petitioners. | ) | Docket No.<br>96-3739, D-54-E |

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**PETITION FOR REHEARING IN BANC**

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Petitioners, Ronald and Anissa Coulter, Plaintiffs in Civil Action No. 94-0629, entitled Ronald and Anissa Coulter, et. al. v. Metropolitan Life Insurance Co., Thomas Rostek, Plaintiff in Civil Action No. 94-1108, captioned as Thomas Rostek, et. al. v. Metropolitan Life Insurance Co., (which were originally filed in the United States District Court for the Western District of

Pennsylvania), Douglas A. Smith, Plaintiff in Civil Action No.96-179, captioned as **Douglas Smith v. Metropolitan Life Insurance Co., et. al.**, and Joseph and Donna Corriere, Plaintiffs, in the Civil Action No. 96-833, captioned as **Corriere, et al. v. Metropolitan Life Insurance Company, et. al.**, (which were originally filed in the Court of Common Pleas of Allegheny County, Pennsylvania), hereby petition, pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, for a rehearing in banc of the Court's decisions of February 13, 1997, which denied their petitions for a writ of mandamus[1].

## I STATEMENT OF ISSUES PRESENTED

The Petitioners respectfully reserve their argued position as to each of the points raised in their denied petition. However, in this petition, the movants seek to address the following points

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[1] The Petitioners originally petitioned for an order by this court directing the Honorable Judge Donetta Ambrose, Judge of the United States District Court for the Western District of Pennsylvania, to vacate the orders transferring their actions to the United States District Court for the Middle District of Florida, Tampa Division, where they are now pending before Judge Steven D. Merryday.

which they believe should have mandated a different conclusion in relation to their prior petition:

(1) A writ of mandamus is the proper remedy to correct a transfer that is based on a clear abuse of discretion or is clearly against applicable law;

(2) The Petitioners, as absent class members, have a constitutional right to collaterally attack a class action settlement in the forum of their choice, pursuant to the Third Circuit opinion in **In re Real Estate Title & Settlement Services Antitrust Litigation**, 869 F.2d 760 (3rd Cir. 1989), and this right required the collateral court to make a determination as to the adequacy of their representation in the settled class and whether they are a member of the settled class;

(3) The Magistrate Judge's recommendation, and the District Court's decision adopting it, clearly misinterpreted the nature of the Corriere's case, and the standard which should be used in making

determinations on motions to transfer; and

(4) The rule in the Third Circuit, as set forth in its opinion in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996) requires the courts in this Circuit, when reviewing certification classes, to determine if the court strictly complied with the requirements of Rule 23.

## II ARGUMENT

### A. THE THIRD CIRCUIT HAD JURISDICTION TO REVIEW THE TRANSFER OF THE PRESENT ACTION TO FLORIDA.

In Respondent's initial argument in its response to the original Petition for Writ of Mandamus, the Respondent argued that the Third Circuit lacks the jurisdiction to hear the petition, because the Third Circuit lost jurisdiction, the moment the District Court transferred the involved actions to the Middle District of Florida. The Respondent's argument, however, ignores the clear fact that the Petitioners' Writs are challenging the transferring court's authority

to transfer the involved actions to Florida. It is well established, that the courts of appeals have jurisdiction under the power conferred by the All Writs Statute, 28 U.S.C. §1651, to correct transfers that are based on clear abuses of discretion, or are clearly against applicable law. Shutts v. Armco Steel corp., 431 F.2d 22, 23 (3rd Cir. 1970), cert denied, 40 U.S. 910, 91 S.Ct. 871, 27 L.Ed 2d 808 (1971); Wilkins v. Erickson, 584 F.2d 969, 971 (8th Cir. 1973). When a district court lacks the power or authority to transfer a case, the appellate courts have the power to order the transfer reversed, regardless of whether the case has been physically transferred. Farrell v. Wyatt, 408 F.2d 662 (2d Cir. 1969); Gower v. Leyman, 799 F.2d 925 (4th Cir. 1986); Shutts v. Armco Steel corp., 431 F.2d at 23.

Accordingly, since the Petitioners' original petitions, and the following sections of this petition, clearly establish that the district court lacked the authority to transfer the present actions, prior to making a decision as to either the adequacy of the Petitioners' representation in the Horton action, or whether they were even members of that class, this Circuit had the jurisdiction

to correct the clearly erroneous transfer, and it should have granted the Petitioner's Writs.

**B. THE PETITIONERS HAVE A CONSTITUTIONAL RIGHT TO COLLATERALLY ATTACK A CLASS ACTION SETTLEMENT IN THE FORUM OF THEIR CHOICE, AND THIS RIGHT REQUIRES THE REVIEWING COURT TO MAKE A DETERMINATION AS TO THE ADEQUACY OF THE REPRESENTATION IN THE RELEVANT CLASS OR WHETHER THEY ARE A MEMBER OF THAT CLASS.**

In the Magistrate Judge's Report and Recommendations, that were adopted as the opinions of the District Court, the Magistrate Judge Benson based his decision upon his belief that the **Horton** Court is the only court qualified to hear challenges to the **Horton** class settlement, and the fact that in the language in the **Horton** Court's Final Order Approving the Class Settlement, the Court attempted to retain jurisdiction to rule on these issues. The Magistrate Judge's conclusion and the District Court's decision adopting it, however, apparently ignore the underlying law of class actions and the constitutional protections that it grants to absent class members, which clearly warrant the rejection of the District

Court's Order's, and the granting of the Petitioner's Writ.

In particular, it is well settled that individuals who were not adequately represented in a prior class action, or whose individual claims are not in common with those litigated in the prior class action, may either ignore the judgement, collaterally attack it, or bring an independent action. Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed. 2d 835 (1989); Cooper v. Federal Reserve Bank, 467 U.S. 867, ___ S.Ct. ____, ____ L.Ed.2d ____ (1984); In re Real Estate, Supra, see later case, cert denied sub nom Chicago Title Ins. Co. v. Tuscon Unified School District, 493 U.S. 821, ___ S.Ct ___, ___ L.Ed.2d ___ (1989); cf. Hansberry v. Lee, 311 U.S. 32, 42-44, 61 S.Ct. 115, 85 L.Ed. 22 (1940)(Supreme Court recognizes the right of plaintiff to bring separate action, despite prior class settlement, because prior class representatives did not adequately represent plaintiff's interests in prior suit).

More importantly, those absent-class members, who were not adequately represented in the prior class action, or whose individual claims are not in common with those litigated in the

prior class action, may challenge a class action settlement based on the adequacy of their representation and their due process protection in the forum of their choice. See In re Real Estate, Supra, (the Court recognized Arizona school board's ability to challenge the adequacy of their due process protection in a prior class action filed in the Eastern District of Pennsylvania through a collateral attack in the forum of their choice, i.e. Arizona).

The Magistrate and District Court's decision, however, ignores these well-established principles and does not address the adequacy of the Petitioners' representation in the Horton action, or the question of whether or not they were members of the Horton class. Instead, the District Court based its decision upon its belief that the Horton Court is the only court qualified to hear challenges to the Horton class settlement.

This District Court's decision, adopting the Magistrate Judge's conclusion, clearly is contradicted by the well-established case law concerning who is qualified to make decisions concerning the res judicata effect of a foreign judgment, and is contrary to the findings of the Third Circuit in In re Real Estate, Supra.

In particular, it is well established that both state courts and federal district courts are more than qualified to make decisions concerning whether they should give preclusive effects to prior class action settlements. Hansberry v. Lee, 311 U.S. 32, 42-44, 61 S. Ct. 115, 85 L. Ed. 22 (1940); Doe v. Allied Signal, Inc., 985 F.2d 908, 912 (7th Cir. 1993) In particular, as the Seventh Circuit noted in Doe v. Allied Signal, Inc.:

> As a matter of policy, state courts [as well as federal district courts] are fully capable of invoking res judicata to protect federal judgments if the second case is merely an attempt to regenerate dead claims.

985 F.2d at 912.

Moreover, in In re Real Estate, supra, this very Circuit, conclusively addressed and rejected the argument that an injunction, (issued as part of, or in conjunction with, an order approving a class action settlement), could serve as a bar to collateral litigation which challenged the adequacy of representation in the prior settlement. The Third Circuit found that such challenges do not have to be brought in the forum in which the

class action was initiated, but could be brought in the forum of the class action challenger's choosing. Id.

Underlying, the Court's decision was its recognition of the injustice and hardship which would be inflicted upon an individual if they were forced to litigate their challenges to the adequacy of the representation (or if they were a member of a class) in a distant forum. Moreover, the Court clearly and specifically recognized that funnelling all challenges to the adequacy of representation in a class action to the class action court would not serve the interests of judicial economy, because a defendant in a class action could use this hardship as a tool in its litigation strategy. In re Real Estate at 770.

The Third Circuit's holding clearly showed that this Circuit recognizes that the burden placed on a absent class member by the litigation in a distant forum can create a violation of a class member's Fifth or Fourteenth Amendment guarantee of due process. Id. at 767, n. 7. However, the Court specifically noted that "[a]n absent plaintiff is not subject to the burdens of distant forum litigation [thereby creating a violation of that individuals due

process rights] when it is bound to a class action settlement, as long as it can challenge the adequacy of representation in the forum of its choice." Id. at 769.

In the present case, however, the District Court's decision which grants the Defendant's Motion to Transfer, without inquiring into the adequacy of the Plaintiffs' representation, or whether they were even members of the Horton class, clearly disposes with the constitutional protection that the Third Circuit recognized allows class actions to pass Fifth and Fourteenth Amendment scrutiny, which should have required this Court to grant the Petitioners' Writ.

To counter this argument, the Respondent Metropolitan Life argued in its response to the original Petition, that individuals do not have a constitutional right to collaterally attack the adequacy of their representation in a prior class action in the forum of their choice. (See page 10 of Defendant's Response to original Petition). In support of this conclusion, the Respondent cited to two cases, Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3rd Cir. 1994)[hereinafter "Grimes"] and Carlough v. Amchem

Products, Inc., 10 F.3d 189 (3rd Cir. 1993)[hereinafter "Carlough"]. The Respondent's reliance on these cases, however, is clearly misplaced as they are legally and factually distinct from the present action.

In particular, the Court in Grimes, supra, did not address the issue of whether members in a subsequent suit could be considered members of the class in a prior suit, as this issue was apparently conceded. Moreover, the plaintiffs in Grimes, supra, in contrast to the present Petitioners[2], clearly were subject to the jurisdiction of the forum of the prior class action due to their position as shareholders in a corporation incorporated in that forum.

The Respondent next argued that the Plaintiff's reliance on In re Real Estate, Supra, is misplaced, because "In re Real Estate expressly applies only to classes certified under Federal Rule Civ. P. 23(b)(1) and/or (b)(2)." (See page 10 of Defendant's

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[2] The Petitioners in the present action have no ties which could bind them to the jurisdiction of the forum of the Horton action.

Response to Plaintiffs' Objections to Magistrate Judge's Report and Recommendations.)[3] Instead, the Respondent contends that the Court should look to Carlough, Supra, a case which was based on certification under Rule 23(b)(3), and which authorized the use of injunction to bar suit by an absent class member in a separate forum. Id. The Respondent Metropolitan Life's conclusion (that individuals do not have a right to collaterally attack class action settlements), however, is based on an overly broad interpretation of Carlough, supra, and it ignores the portions of In re Real Estate, supra, which address class actions as a whole, including its devotion of a major portion of its opinion to the interpretation of Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct 295, 86 L.Ed.2d 628 (1985), a case which was based on a class seeking purely monetary damages.

In particular, the Carlough, Supra, decision does not give

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[3] The Respondent's argument is interesting, as one of the very cases it cites to for its argument that there is no right to collaterally attack a class action in the forum of your choice, Grimes v. Vitalink, supra, involved a class in which the members did not have the right to opt out.

wholesale authorization for the federal courts to enjoin absent class members from litigating in other forums, as the Respondent contends. Metropolitan Life overlooks the controlling factors behind the Third Circuit's decision in Carlough, Supra: the timing of the issuance of the injunction[4]; and the fact that the state court action in Carlough, Supra, was a direct attempt to usurp the authority of the federal court[5]. These facts clearly distinguish it from both the present case and In re Real Estate, supra.

Accordingly, since none of the cases cited by the Respondent are analogous with the present factual scenario, and

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[4] In Carlough, supra, the injunction was issued prior to the class notification, the opt-out period and the fairness hearing itself. Since the opt-out period had not expired, the absent class members in Carlough, supra, still had the opportunity to exclude themselves from the class and they could pursue their claims on their own if they did not feel the class adequately protected their interests, through the opt-out procedure. The fact that this due process protection (i.e. the opt-out procedure) was still available to the absent class members was central in the court's decision. Id.

[5] In particular, in Carlough, absent class members in a federal class action (that had not yet been certified) brought a state court action seeking a declaration that the proposed settlement was unenforceable and not entitled to full faith and credit. Id. at 195.

none of them overrule the clearly established precedent, which recognizes that absent class members have the constitutional right to challenge their inclusion in a class in the forum of their choice, the District Court's order transferring the Petitioners' cases, prior to ruling on whether or not they were members of the Horton class, clearly was an abuse of discretion and was clearly against the weight of the established law, which should have warranted the granting of the Movants' original Petitions.

### C. THE DISTRICT COURT'S DECISION CLEARLY MISINTERPRETS THE STANDARD WHICH SHOULD BE USED WHEN RULING ON MOTIONS TO TRANSFER.

The Magistrate Judge, in his recommendation that was adopted as the opinion of the District Court, represented that he was required to transfer the present actions to the United States District Court for the Middle District of Florida. The Magistrate's conclusion, however, and the District Court's decision adopting it, clearly have misinterpreted the law applicable to motions to

transfer.

The case which the Magistrate cites to, Eberhart v. Baker, 652 F.Supp. 1475 (W.D.Pa. 1987), clearly sets forth the standard which the Court must use when ruling on a motion to transfer. In particular the Court in Eberhart notes:

> The burden is on the moving party to establish facts supporting the motion to transfer. **A balancing of proper interests must weigh heavenly in favor of the transfer** [for the transfer to take place]. Shutt v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971).

652 F.Supp. at 1476 (emphasis added).

Four factors must be looked to when balancing the competing interests involved in a transfer which include:

> (1)the plaintiff's choice of forum; (2) the relative ease of access to the sources of proof (3) the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of unwilling witnesses and (4) practical considerations which will make trial of a case easy, expeditious and inexpensive.

Eberhart, 652 F.Supp. at 1476; PPG Industries, Inc. v. Systonetics, Inc., 614 F.Supp. 1161, 1163 (W.D.Pa. 1985).

Despite these requirements, the Magistrate's opinion,

ignores all of these factors in his recommendation. In particular, at no point did the Magistrate even mention the Plaintiff's choice of forum. At no point does the Magistrate mention the fact that the present action concerns the illegal marketing of life insurance in Pennsylvania, or the fact that the Petitioner's action sought damages under Pennsylvania law, which was different than the law of the transferee forum. Moreover, the Magistrate did not even mention the difficulty which the transfer would cause in obtaining access to the sources of proof in this action, or the expense which will be involved in compelling the attendance of unwilling witnesses. Instead the Magistrate merely states that the pendency of related litigation in the transferee court is a strong reason for transferring an case. In support of this conclusion, the Magistrate Judge cited to two decisions: Supco Automotive Parts, Inc. v. Triangle Auto Spring Co., 538 F.Supp. 1187 (E.D.Pa. 1982) and Carver v. Knox County, 887 F.2d 1287 (6th Cir. 1287). Nevertheless, although both of these cases address the transfer of actions in the interests of judicial economy, neither presents a compelling reason which should have tipped the District Court's

decision in favor of transfer, in light of the significant problems created by this distant forum.

In particular, both cases, involved transfers to forums in which related actions were pending, creating the distinct possibility of conflicting opinions. In contrast, in the present case the decision (i.e. the settlement) in the district to which the transfer is sought is final. As a consequence, the Magistrate could have readily determined what are the parameters of the Horton decision and if, in fact, it has a preclusive effect on the present actions.

As the preceding section of this argument demonstrated, the Magistrate Judge, as well as the state court from which this action was removed, were more than qualified to make a decision on the res judicata effect of a prior class action proceeding, without forcing the Petitioners to travel to a distant forum. See Doe v. Allied Signal, Inc., 985 F.2d 908, 912 (7th Cir. 1993)(Court holds that state courts are more than qualified to invoke res judicata to protect federal judgments).

Moreover, the Magistrate Judge's conclusion, that the Horton Court is the only court qualified to hear challenges to the

Horton class settlement, clearly was contradicted by the Third Circuit, which has conclusively addressed and rejected the argument that an injunction, (issued as part of, or in conjunction with, an order approving a class action settlement), could serve as a bar to collateral litigation which challenged the adequacy of representation in the prior settlement. See In re Real Estate, Supra.

Accordingly, since it is clear that the Magistrate Judge did not even consider these factors, the failure of the District Court to consider or address them, despite this deficiency in the Magistrate Judge's recommendation, constituted a clear abuse of discretion which should have weighed in favor of granting the Movants' Petitions.

**D. THE RULE IN THE THIRD CIRCUIT, AS SET FORTH IN ITS OPINION IN GEORGINE V. AMCHEM PRODUCTS, INC., 83 F.3D 610 (3RD CIR. 1996,) REQUIRES THE COURTS IN THIS CIRCUIT, WHEN REVIEWING CERTIFICATION CLASSES, TO DETERMINE IF THE COURT STRICTLY COMPLIED WITH THE REQUIREMENTS OF RULE 23.**

The rule in the Third Circuit, as set forth in its opinion in Georgine v. Amchem Products, Inc., 83 F.3d 610, 625 (3rd Cir. 1996) requires the courts in this Circuit, when reviewing certification classes, to determine if the court strictly complied with the requirements of Rule 23.[6]

In Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd

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[6] The Respondent, Metropolitan Life, however, argued in its response to the Corrieres' petition, that the Horton Court's decision to certify should be reviewed based upon the standards set forth by the Eleventh Circuit, which clearly allow a lower standards for settlement classes. (See page 32 of Respondent's Brief) The Respondent's argument, however, ignores the fact that this action is being brought in the Third Circuit. Moreover, this argument may be rendered moot by the Supreme Court's anticipated decision in Amchem Products, Inc. v. Winsor, Supreme Docket No. 96-270, which was argued on February 18, 1997. It is believed that this decision will conclusively establish whether a District Court (like the Horton Court) has the necessary jurisdiction to certify a nationwide settlement class (and issue injunctions protecting that settlement), and if it does, whether that Court must insure that the class strictly compliance with the requirements of Rule 23(a) in the manner as if the case were to be litigated, as the Third Circuit stated was required in its opinion in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996), or whether it may conduct a less strict review, taking into account that the class is being certified for settlement purposes only, as was done by the Horton Court.

Cir. 1996), this Circuit, established the scope of review a court must undertake before deciding whether or not the district court had the authority to certify a class action and the jurisdiction to issue an injunction enjoining collateral litigation. Id. In particular, the Third Circuit's opinion indicates that the reviewing court must, at a minimum, review the class certification, to ensure that the original class certification satisfied all the requirements of Rule 23(a)[7] and comes within at least one provision of Rule 23(b)[8]. Id. at 624.

In addition, the Third Circuit found that, even if a class

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[7] Rule 23(a) mandates a showing that: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a)

[8] To be certified as a (b)(3) class, the judge must determine that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

was to be certified for settlement purposes only, (which is what occurred in **Horton**), Rule 23(a) and 23(b) requirements must be satisfied as if the case were to be litigated. Id. Specifically, the Court held:

> In **In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.**, cert denied sub nom. **General Motors Corp. v. French**, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995), we held that, for settlement classes, the 23(a) requirements must be applied as if the case were going to be litigated. We now hold that, because the 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements, and because "[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes," id. at 799, the 23(b)(3) criteria must also be applied as if the case were to be litigated. While better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception.

Georgine, 83 F.3d at 617-618.

Accordingly, the Court went on to hold:

> Therefore, despite the possibility that settlement-only class actions might serve the "useful purpose of ridding the courts" of the "albatross[]" represented by mass tort actions, **the rule in this circuit is that settlement class certification is not permissible unless the case would have been "triable in class form."**

Id. at 625. (citations omitted)

The Court in Georgine, further noted that an individual choice of law analysis would be necessary in order to determine if nationwide class actions could be certified, due to the numerous states in which potential class members resided. Id. at 618.

In the Horton action, however, the court failed to review the Horton class to determine if it was triable in class form or to apply any choice of law analysis. Instead, the Court used a more lenient standard because it was a settlement class.[9] Accordingly,

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[9] Evidence that the district court relied on the presence of the settlement when deciding to certify the class is presented by its Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object (to the Coulters' Motion to Intervene and/or Object) in which the district court states:

> The Court has not applied Florida law to Pennsylvania residents claims; **nor has it attempted to adjudicate the merits of the plaintiffs' claims.** The only issue before the Court is the fairness and adequacy of the settlement--an issue controlled by the federal law governing settlement class certification and settlement approval.

Clearly this shows that the district court did not conduct an investigation into whether the class adequately represented the

the class certification in Horton, like that in Georgine, supra, is defective, which should preclude the Horton court from retaining jurisdiction over the Petitioners (who are not named parties in the Horton action), or from enjoining their actions. Accordingly, the decision in Horton should not have served as a basis for the transfer of the present case to the Middle District of Florida, which warrants the granting of this petition.

## III CONCLUSION

WHEREFORE, for the reasons set forth more fully above, Petitioners respectfully request that this Court grant their Petition for Rehearing on their Writ of Mandamus and vacate the District Court's Order granting Defendants' Motion to Transfer.

Respectfully submitted,
BEHREND & ERNSBERGER

By: /s/
Steven P. Engel
PA I.D. No. 74524
Kenneth R. Behrend
PA I.D. No. 37961

DATED: February 26, 1997

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interests of the absent class members in light of the law of those individuals' states or whether it would be triable as a class. (See attached Exhibit 4, a copy of the final Order in Horton.)

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 26, 1997, true and correct copies of the foregoing Petition for Rehearing In Banc was served upon the following through U.S. First Class Mail:

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The Honorable Donetta Ambrose
United States District Judge
United States Post Office and Courthouse
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Tampa, FL 33601

By: _____
Steven P. Engel, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 24, 1996
D-56E

No. 96-3737

IN RE RONALD AND ANISSA COULTER, et. al., and THOMAS ROSTEK et al.'s APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Present: GREENBERG, NYGAARD and ROTH, CIRCUIT JUDGES.

1. Petition for Writ of Mandamus.

2. Opposition by Respondent, Metropolitan Life Insurance Company to Petitions for Writs of Mandamus.

/s/
Juanita Johnson 597-3080
Deputy Clerk

ORDER

The foregoing Petition is denied.

By the Court,
/s/
Circuit Judge

Dated: FED 13 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 24, 1996
D-55E

No. 96-3738

IN RE DOUGLAS SMITH'S APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 6, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Present: GREENBERG, NYGAARD and ROTH, CIRCUIT JUDGES.

1. Petition for Writ of Mandamus.

2. Opposition by Respondent, Metropolitan Life insurance Company, to Petitions for Writs of Mandamus.

Rita Golden 597-3080
Deputy Clerk

ORDER

The foregoing Petition is denied.

By the Court,
/s/
Circuit Judge

Dated: FED 13 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 24, 1996
D-54E

No. 96-3739

IN RE JOSEPH AND DONNA CORRIERE'S APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Present: GREENBERG, NYGAARD and ROTH, CIRCUIT JUDGES.

1. Petition for Writ of Mandamus.

2. Opposition by Respondent, Metropolitan Life Insurance Company, to Petitions for Writs of Mandamus.

ORDER

/s/
Rita Golden 597-3080
Deputy Clerk

The foregoing Petition is denied

By the Court,

/s/
Circuit Judge

Dated: FEB 13 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

MISC. DOCKET NO. 9G-179
MDL NO. 1091
JUDGE AMBROSE/
MAGISTRATE JUDGE BENSON

This Document Relates To:

DOUGLAS A. SMITH,

Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,

CIVIL ACTION NO. 96-453
JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

Defendants.

MEMORANDUM ORDER

On March 27, 1996, Civil Action No. 96-453 was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on October 25, 1996, recommended that defendant Metropolitan Life Insurance Company's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #4 at Civil Action No. 96-453) be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel and liaison counsel at Misc. Docket No. 96-179 by first-class mail on October 25, 1996. Objections were filed by plaintiff on November 4, 1996 and an amended certificate of service to plaintiff's objections was filed on November 5, 1996 (Docket #88 and #89 at Misc. Docket No. 96-179). On November 15, 1996, defendant Metropolitan Life Insurance Company filed a response to plaintiff's objections (Docket #102 at Misc. Docket No. 96-179). After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 21st day of November, 1996;

IT IS HEREBY ORDERED that defendant Metropolitan

Life Insurance Company's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #4 at Civil Action No. 96-453) is granted. The Clerk is directed to transfer Civil Action No. 96-453 to the United States District Court for the Middle District of Florida forthwith.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated October 25, 1996 (Docket #9 at Civil Action No. 96-453; Docket #76 at Misc. Docket No. 96-179), is adopted as the opinion of the court.

/s/
DONETTA W. AMBROSE
UNITED STATES DISTRICT JUDGE

CC: Honorable Kenneth J. Benson United States Magistrate Judge

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CLERK'S OFFICE
United States District Court
FOR THE
WDPA

SMITH

vs.
METROPOLITAN
LIFE INS.,ET AL

Civil Action No.
96-453

There was entered on the docket 11/26/96

an order transferring case, to Middle Dist of Fla.

June A. Droch /s, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION.

Misc. Docket No. 96-179
MDL NO. 1091

JUDGE AMBROSE

THIS DOCUMENT RELATES TO:

MAGISTRATE JUDGE BENSON

Coulter v. Metropolitan Life Insurance Company,
Civil Action No. 94-629

and

Rostek v. Metropolitan Life Insurance Company,
Civil Action No. 94-1108

**MEMORANDUM ORDER**

On December, 4, 1995, Civil Action No.94-629 and Civil Action No. 94-1108 were referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in Accordance with the Magistrates Act, 28 U.S.C, §636(b)(1)(A) and (B) , and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on

October 8, 1996, recommended that defendant's motion to transfer Civil Actions Nos. 94-629 and 94-1108 to the United States District Court for the Middle District of Florida (Docket #2 at Miscellaneous No. 96-179) be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on liaison counsel at Misc. Docket No. 96-179 by First-class mail on October 8, 1996. Objections were filed by all plaintiffs on October 22, 1996,(Docket #72 at Misc. Docket No. 96-179), and on October 31, 1996, defendant MetLife filed a response to plaintiffs' objections,(Docket #83 at Misc. Docket No. 96-179). After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 8th day of November, 1996;

IT IS HEREBY ORDERED that defendant's motion to transfer Civil Action No. 94-629 and Civil Action No. 94-1108 to the United States District Court for the Middle District of Florida (Docket #2 at Misc. Docket No. 96-179) is granted. The Clerk is directed to transfer Civil Action No. 94-629 and Civil Action No.

94-1108 to the United States District Court for the Middle District of Florida forthwith.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated October 8, 1996 (Docket #54 at Civil Action No. 94-629; Docket #60 at Civil Action No. 94-1108; Docket #62 at Misc. Docket No. 96-179), is adopted as the opinion of the court.

/s/
DONETTA W. AMBROSE
UNITED STATES DISTRICT JUDGE

CC: Honorable Kenneth J. Benson
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

Misc. Docket N0.. 96-179
MDL NO. 1091

JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

This Document Relates To:

JOSEPH A. CORRIERE and DONNA J. CORRIERE, his wife,

Plaintiffs,

v.

METROPOLITAN LIFE INS. COMPANY and JAMES D. SPANGLER

Civil Action No. 96-833
JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

Defendants.

MEMORANDUM ORDER

On May 6, 1996, Civil Action No. 96-833 was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on

October 8, 1996, recommended that defendant's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #5 at Civil Action No. 96-833) be granted, and that plaintiffs, motion to remand (Docket #13 at Civil Action No. 96-833) be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on liaison counsel at Misc. Docket No. 96-179 by first-class mail on October 8, 1996. Objections were filed by plaintiffs Joseph A. Corriere and Donna J. Corriere on October 22, 1996 (Docket #20 at Civil Action No. 96-833) , and on October 31, 1996, defendants filed a response to plaintiffs' objections (Docket #84 at Misc. Docket No. 96-179). After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 8th day of November, 1996;

IT IS HEREBY ORDERED that defendant's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #5 at Civil Action No. 96-833) is granted, and that plaintiffs, motion to remand (Docket #13 at Civil

Action No. 96-833) is denied. The Clerk is directed to transfer Civil Action No. 96-833 to the United States District Court for the middle District of Florida forthwith.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated October 8, 1996 (Docket #19 at Civil Action No. 96-833; Docket #63 at Misc. Docket No. 96-179), is adopted as the opinion of the court.

/s/
DONETTA W. AMBROSE
UNITED STATES DISTRICT JUDGE

CC: Honorable Kenneth J. Benson
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

Misc. Docket No. 96-179
MDL NO. 1091

THIS DOCUMENT RELATES TO:

Coulter v. Metropolitan Life Insurance Company,
Civil Action No. 94-629

and

Rostek v. Metropolitan Life Insurance Company,
Civil Action No. 94-1108

JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that defendant's motion to transfer these cases to the United States District Court for the

Middle District of Florida (Docket #2 at Miscellaneous No. 96-179) be granted.

II. REPORT

Presently before the court are two proposed class actions which were initiated in the Court of Common Pleas of Allegheny County, Pennsylvania, and were thereafter removed to this court by defendant MetLife. The first of these actions is styled as Coulter v. Metropolitan Life Insurance Co., and is docketed at Civil Action No. 94-629. That case was originally filed in the state court on March, 25, 1994. There are 15 named plaintiffs, who seek to represent a class consisting of all Pennsylvania resident who purchased life insurance policies or annuities from MetLife which policies or annuities were not formally approved by the Pennsylvania Insurance Commissioner. A subclass is also asserted consisting of all Pennsylvania residents who purchased retirement or savings plans which were, in reality, "nothing more than life insurance policies."

The second action is styled as Rostek v. Metropolitan Life Insurance Co., and is docketed at Civil Action No. 94-1108. This

action was commenced on June 30, 1994, and seeks to certify a class consisting of all Pennsylvania residents who purchased college savings plans in an amount over $10,000, for children under the age of 18, which were, in reality, life insurance policies on the children. There are five named plaintiffs in the Rostek action.

Defendant MetLife removed each of these actions from the state courts on the basis that members of the prospective class in each of them are barred from litigating their claims by a federal court decision in Horton v. Metropolitan Life Insurance Co., which was litigated as a class action in the United States District Court for the Middle District of Florida. MetLife has filed a motion to transfer these actions to the United States District Court for the Middle District of Florida (Docket #2 at Miscellaneous No. 96-179). MetLife asserts that transfer of these cases is appropriate because the Florida court has approved a settlement, and issued an injunction against class members litigating their claims. Further, it is asserted that the Florida court has retained jurisdiction over the question of whether a particular party is a member of the class. MetLife also filed a brief in support of the motion (Docket #3) and

a supplement to the motion (Docket #6) Plaintiffs in the Coulter and Rostek actions have responded to the motion (Docket #18 and #19), and have filed a memorandum (Docket #20) and exhibits in support thereof (Docket #21). MetLife has filed a reply (Docket #34) with exhibits in support thereof (Docket #35). Plaintiffs have filed a surreply. The motion is ripe for disposition.

## LEGAL STANDARDS

A district court may, "[f]or the convenience of parties and witnesses, in the interest of justice . . . transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. 91404(a). This statute vests broad discretion with the district court in determining when transfer is appropriate. PPG Industries, Inc. v. Systonetics, Inc., 614 F.Supp. 1161, 1163 (W.D.Pa. 1985). In exercising this discretion, the court should be mindful of the purposes of §1404(a), which are to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Id.

> The burden is on the moving party to establish facts supporting a motion to transfer under this section. A balancing of proper interests must weigh heavily in favor of the transfer. Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971). Four factors to be weighed by this Court are: (1) plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; and (4) practical considerations which will make trial of a case easy, expeditious and inexpensive.

Eberhart v. Baker, 652 F.Supp. 1475, 1476 (W.D.Pa.. 1.987), citing PPG Industries, supra. Further, the pendency of related litigation in the transferee court is a strong reason for transferring a case, Supco Automotive Parts, Inc. v. Triangle Auto Spring Co., 538 F.Supp. 1187, 1192 (E.D.Pa. 1982), as is the fact that the transferee court has retained jurisdiction over the subject matter involved in the latter-filed action. Carver v. Knox County, 887 F. 2d 1287 (6th Cir. 1989), cert. denied, 495 U.S. 919 (1990) Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978).

## THE HORTON CASE

The Horton case was filed as a nationwide class action in the United States District Court for the Middle District of Florida. On April 24, 1994, one month before the Coulter action was filed, the court in Horton preliminarily approved a proposed settlement and class notice plan and certified the following settlement class:

> [A]ll persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of MetLife between January 1, 1990 and October 31, 1993.

(Exhibit A to Docket #3 at ¶1) . Potential class members who did not wish to participate were required to submit written requests for exclusion on or before June 13, 1994 (Id. at ¶9).

On October 25, 1994, after a hearing, the Florida court approved the settlement, and entered an order releasing MetLife and its agents which was "binding on all settlement class members." (Exhibit D to Docket #3 at ¶4). The court retained

jurisdiction to effectuate the order and final judgment, and as may be necessary in aid of the court's "continuing jurisdiction." (Id. at ¶7). The court then entered an order on November 8, 1995, granting a permanent injunction enjoining all Horton class members from litigating their claims in any forum other than the United States District Court for the Middle District of Florida (Exhibit F to Docket #3).

While the Horton case was pending, plaintiffs in the Coulter action moved to intervene on May 20, 1994 (Exhibit G to Docket #3). They sought to sever out from the Horton class all Pennsylvania residents. On July 18, 1994, the Florida district court held a hearing on the proposed settlement at which the Coulter plaintiffs' attorney appeared. The court overruled the objections to the proposed settlement raised by counsel, and also denied the motion to intervene (Exhibit H to Docket #3 at 49, 54). An appeal was taken from this oral order to the Court of Appeals for the Eleventh Circuit. The court then issued a written order with findings of fact and conclusions of law on October 25, 1994 (Exhibits I and J, Docket #3).

At the July 18, 1994 hearing, counsel for the Coulter plaintiffs requested exclusion from the class for his clients (Exhibit H to Docket #3 at 51-54, 112-114). This was followed by a written request for exclusion on September 19, 1994 (Exhibit K to Docket #3). This motion was denied as untimely by the court on October 24, 1994 (Exhibit L to Docket #3). This order was also appealed by the Coulter plaintiffs.

On August 26, 1994, counsel for plaintiffs filed a motion seeking a declaration that they were not members of the Horton class (Exhibit M to Docket #3). The court denied the motion without prejudice, and appointed a Special Master to resolve the issue (Exhibit N to Docket #3). Potential excluded parties were directed to file a petition with the Special Master on or before November 17, 1994 (Id.). No petition was filed, and the other named plaintiffs in the Coulter action filed an appeal from this order.

On April 2, 1996, the Eleventh Circuit Court of Appeal affirmed the lower court's orders in full. Grilli v. Metropolitan Life Insurance Co., 78 F.3d 1533, 1538 (11th Cir. 1996).

In responding to the motion to transfer, plaintiffs make several arguments. First, they assert that the order from the MDL directing that these actions remain in this district prevent this court from transferring those actions to Florida. Second, they assert that they are not members of the Horton class. Third, plaintiffs make arguments concerning whether they received adequate representation or notice in the Horton class action, and whether the court complied with Rule 23 in approving the settlement.

The first argument is the only one which need be addressed by this court on its merits. The Panel on Multidistrict Litigation has not entered any order which restricts this court's power to transfer cases removed from Pennsylvania state court. Different concerns would be implicated if one of the cases transferred from another court to this by the Panel were involved here. Rather, the cases were originally in this district as they were removed from the state court to this court. In fact, Rule 14 of the Federal Rules of Judicial Panel for Multidistrict Litigation, Rule 14, specifically provides for transfer pursuant to Rule 1404(a):

Each transferred action that has not been ter

> minated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. §1404 (a) or 1406.

(emphasis added). Thus, this is no bar to this court transferring the Coulter and Rostek actions should it decide that transfer in otherwise appropriate.

The remaining arguments raised by plaintiffs need not be addressed on their merits. The real question is whether this court or the Florida court should address them. This question has been answered in no uncertain terms by the actions of the parties and the Court of Appeals for the Eleventh Circuit. Counsel for plaintiffs, by attempting to participate in the Horton action has clearly indicated an understanding that his clients' may well be members of that class. Further, the Florida court was convinced that, at least with respect to the Coulters, its orders barred further litigation. The Court of Appeals for the Eleventh Circuit agreed with this determination.

This court ought not to sit in judgment of the actual decisions reached by its sister court in Florida with respect to the

Coulter plaintiffs. Nor should this court accept plaintiffs' invitation to ignore the fact that the Florida court has retained jurisdiction to interpret the orders it entered in all cases which may involve Horton class members. Rule 1404(a) is addressed to concerns of judicial economy. This concern is implicated where, as here, resolution of the issues raised by plaintiffs in both the Coulter and Rostek actions necessarily involve review of the scope of the proceedings undertaken in the Middle District of Florida, and the propriety of that court's orders. The most convenient, and appropriate, forum of litigating those issues is the United States District Court for the Middle District of Florida.

This conclusion applies equally to the proposed class representatives in the Rostek action, even though one of them has timely opted out of the Horton class settlement. This is so since the representative plaintiffs seek to represent a class of persons who, like the proposed class in Coulter, appear to fall within the Horton class. The final decision on whether this proposed class should be able to litigate its claims in light of the orders entered in Horton is a decision which should be reached by the court which

entered those orders.

## CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion to transfer Civil Actions Nos. 94-629 and 94-1108 to the United States District Court for the Middle District of Florida (Docket #2 at Miscellaneous Docket No. 96-179) be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636 (b)(1)(B) and (C) , and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/
KENNETH T. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: October 8, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

MISC. DOCKET NO. 96-179
MDL NO. 1091
JUDGE AMBROSE/
MAGISTRATE JUDGE BENSON

This Document Relates To:

DOUGLAS A. SMITH,

Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,

CIVIL ACTION NO. 9G-453
JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

Defendants.

## MAGISTRATE JUDGE'S REPORT AND RECONSIDERATION

## I. RECOMMENDATION

It is respectfully recommended that defendant Metropolitan Life Insurance Company's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #4

at Civil Action No. 96-453) be granted.

II. REPORT

This is an action filed by plaintiff against defendant MetLife asserting fraudulent inducement by MetLife and its agents in selling an insurance policy to plaintiff as a "retirement plan." Initially, this matter was filed as two separate state court actions, which were consolidated in the state court and removed to this court on the basis that plaintiff is a member of a class action, Horton v. Metropolitan Life Insurance Co., Civ. No. 93-1849-CIV-T-23A (M.D.Fla.), which was settled, and which settlement allegedly prevents plaintiff from pursuing his claims in this court. MetLife has filed a motion to transfer this case to the Florida court which approved the settlement in Horton. Similar issues were raised and briefed by counsel for plaintiff in other cases pending before this court, and plaintiff was given the opportunity to offer any different arguments in opposition to transfer that he may have. No such response was filed, and the motion is ripe for disposition.

## LEGAL STANDARDS

A district court may, "[f]or the convenience of parties and witnesses, in the interest of justice . . . transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. §1404(a). This statute vests broad discretion with the district court in determining when transfer is appropriate. PPG Industries, Inc. v. Systonetics, Inc., 614 F.Supp. 1161, 1163 (W.D.Pa. 1985). In exercising this discretion, the court should be mindful of the purposes of §1404 (a), which are to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Id.

> The burden is on the moving party to establish facts supporting a motion to transfer under this section. A balancing of proper interests must weigh heavily in favor of the transfer. Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971). Four factors to be weighed by this Court are: (1) plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; and (4) practical considerations which will make trial of a case easy, expeditious and inexpensive.

Eberhart v. Baker, 652 F.Supp. 1475, 1476 (W.D.Pa. 1987), citing PPG Industries, supra. Further, the pendency of related litigation in the transferee court is a strong reason for transferring a case, Supco Automotive Parts, Inc. v. Triangle Auto Spring Co 538 F.Supp. 1187, 1192 (E.D.Pa. 1982), as is the fact that the transferee court has retained jurisdiction over the subject matter involved in the latter-filed action. Carver v. Knox County, 887 F.2d 1287 (6th Cir. 1989), cert. denied, 495 U.S. 919 (1990); Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978).

## THE HORTON CASE

The Horton case was filed as a nationwide class action in the United States District Court for the Middle District of Florida. On April 24, 1994, more than a year before the instant actions were commenced in state court, the United States District Court for the Middle District of Florida certified the following settlement class in Horton:

> [A]ll persons who purchased a Metlife whole life

> insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of MetLife between January 1, 1990 and October 31, 1993.

(Exhibit A to Docket #3 at ¶1) . Potential class members who did not wish to participate were required to submit written requests for exclusion on or before June 13, 1994 (Id. at ¶9).

On October 25, 1994, after a hearing, the Florida court approved the settlement, and entered an order releasing MetLife and its agents which was "binding on all settlement class members." (Exhibit D to Docket #3 at ¶4). The court retained jurisdiction to effectuate the order and final judgment, and as may be necessary in aid of the court's "continuing jurisdiction." (Id. at ¶7). The court then entered an order on November 8, 1995, granting a permanent injunction enjoining all Horton class members from litigating their claims in any forum other than the United States District Court for the Middle District of Florida (Exhibit F to

Docket #3) . The allegations presented so far by plaintiff place him within the Horton class, and he does not allege that he moved to be excluded from the settlement.

In responding to the motion to transfer, plaintiff makes several arguments. First, he asserts that the order from the MDL directing that these actions remain in this district prevents this court from transferring those actions to Florida. Second, he asserts that he is not a member of the Horton class. Third, plaintiff makes arguments concerning whether he received adequate representation or notice in the Horton class action, and whether the court complied with Rule 23 in approving the settlement.

The first argument is the only one which need be addressed by this court on its merits. The Panel on Multidistrict Litigation has not entered any order which restricts this court's power to transfer cases removed from Pennsylvania state court. Different concerns might be implicated if this were one of the cases transferred by the Panel from another court to this. Rather, this case was originally in this district; it was removed from the state court to this court. In fact, Rule 14 of the Federal Rules of

Judicial Panel for Multidistrict Litigation, Rule 14, specifically provides for transfer pursuant to Rule 1404(a):

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. §1404(a), or 1406.

(emphasis added). Thus, this is no bar to this court transferring this action should it decide that transfer is otherwise appropriate.

The remaining arguments raised by plaintiff need not be addressed on their merits. The real question is whether this court or the Florida court should address them. This writer has already recommended transferring other cases to the Horton court so that it can exercise the very jurisdiction which it has retained to determine, in the first instance, whether plaintiff is, in fact, barred by the Horton settlement. A process has been established in that court, and this court should not permit plaintiff and others to challenge the Horton settlement piecemeal in courts all over the nation. Hence, the motion to transfer should be granted.

## CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion to transfer this action to the United States District Court for the Middle District of Florida (Docket #4 at Civil Action No. 96-453) be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636 (b) (1) (13) and (C) , and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/
KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: October 25 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

Misc. Docket No. 96-179
MDL NO. 1091

JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

This Document Relates To:

JOSEPH A. CORRIERE and
DONNA J. CORRIERE, his wife,
v. METROPOLITAN LIFE INSURANCE COMPANY and JAMES D. SPANGLER
CIVIL ACTION NO. 96-833

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that defendant's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #5 at Civil Action No. 96-833) be granted, and that plaintiffs, motion to remand (Docket #13 at Civil Action No. 96-833) be, denied.

II. REPORT

This is an action commenced by plaintiffs by Writ of

Summons in the Court of Common Pleas of Allegheny County, Pennsylvania on May 8, 1995. The complaint was filed on April 3, 1996, and the notice of removal followed on May 3, 1996 (Docket #1). The basis for removal is alleged to be a federal court decision which is res judicata and bars plaintiffs' claims. MetLife has moved to transfer this action to the United States District Court for the Middle District of Florida (Docket #5) on the basis that a decision rendered by that court in Horton v. Metropolitan Life Insurance Co., is being collaterally attacked by plaintiffs here, and that a class action settlement and the accompanying orders entered by that court bar plaintiffs' claims here. Plaintiffs have responded to the motion (Docket #9), and have filed a brief and exhibits in support of that response (Docket #9, #10 and #11). Plaintiffs have also filed a motion to remand (Docket #13), and brief in support thereof (Docket #14). MetLife has responded thereto with a brief and exhibits (Docket #17 and #18). The motions are ripe for disposition.

## LEGAL STANDARDS

A district court may, "[f]or the convenience of parties and witnesses, in the interest of justice . . . transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. §1404(a). This statute vests broad discretion with the district court in determining when transfer is appropriate. PPG Industries, Inc. v. Systonetics, Inc., 614 F.Supp. 1161, 1163 (W.D.Pa. 1985). In exercising this discretion, the court should be mindful of the purposes of §1404(a), which are to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Id.

> The burden is on the moving party to establish facts supporting a motion to transfer under this section. A balancing of proper interests must weigh heavily in favor of the transfer. Shutte v. Armco Steel Co., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971). Four factors to be weighed by this Court are: (1) plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; and (4) practical considerations which will make trial of a case easy, expeditious and inexpensive.

Eberhart v. Baker, 652 F.Supp. 1475, 1476 (W.D.Pa. 1987), citing PPG Industries, supra. Further, the pendency of related litigation in the transferee court is a strong reason for transferring a case, Supco Automotive Parts, Inc. v. Triangle Auto Spring Co., 538 F.Supp. 1187, 1192 (E.D.Pa. 1982), as is the fact that the transferee court has retained jurisdiction over the subject matter involved in the latter-filed action. Carver v. Knox County, 887 F.2d 1287 (6th Cir. 1989), cert. denied, 495 U.S. 919 (1990); Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978).

## THE HORTON CASE

The Horton case was filed as a nationwide class action in the United States District Court for the Middle District of Florida. On April 24, 1994, the court in Horton preliminarily approved a proposed settlement and class notice plan and certified the following settlement class:

> [A]ll persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part

> on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of metlife between January 1, 1990 and October 31, 1993.

(Exhibit A to Docket #3 at ¶1) . Potential class members who did not wish to participate were required to submit written requests for exclusion on or before June 13, 1994 (Id. at ¶9).

On October 25, 1994, after a hearing, the Florida court approved the settlement, and entered order releasing MetLife and its agents which was "binding on all settlement class members." (Exhibit D to Docket #3 at ¶4). The court retained jurisdiction to effectuate the order and final judgment, and as may be necessary in aid of the court's "continuing jurisdiction." (Id. at ¶7). The court then entered an order on November 8, 1995, granting a permanent injunction enjoining all Horton class members from litigating their claims in any forum other than the United States District Court for the Middle District of Florida (Exhibit F to Docket #3).

Plaintiffs in this case bought two whole life policies from a MetLife representative during the class period. Further, it is alleged that these policies were misrepresented by the agent to be retirement or investment plans. Hence, at least facially these claims are the same as those addressed by the court in Horton.

In responding to the motion to transfer, plaintiffs assert that they do not fall within the Horton class for various reasons. They also assert that they are not bound by the orders entered in that case because they did not receive sufficient notice of the action, and were not adequately represented by plaintiffs in Horton. I do not believe, however, that the merits of these arguments should be reached by this court. Rather, the initial question is which court ought to address the merits of these arguments. This question has been answered in no uncertain terms by the Florida District Court and Court of Appeals for the Eleventh Circuit. Counsel for plaintiffs in this case also represents the plaintiffs in another case filed in this district, Coulter v. Metropolitan Life Insurance Co., docketed at Civil Action No. 94-629. He attempted to intervene in the Horton action on behalf of the Coulter plaintiffs, and also

attempted to have the Florida District Court declare the Coulter plaintiffs to be outside of the Horton class. The Florida court ruled on these motions, and its rulings were upheld by the Court of Appeals for the Eleventh Circuit in Grilli v. Metropolitan Life Insurance Co., 78 F.3d 1533 (llth Cir. 1996). Likewise, the initial determination of whether the plaintiffs here are members of the Horton class, and whether they are bound by the orders entered in Horton, should be made by that court.

This court ought not accept plaintiffs' invitation to ignore the fact that the Florida court has retained jurisdiction to interpret the orders it entered in all cases which may involve Horton class members. Rule 1404(a) is addressed to concerns of judicial economy. This concern is implicated where, as here, resolution of the issues raised by plaintiffs necessarily involve review of the scope of the proceedings undertaken in the Middle District of Florida, and the propriety of that court's orders. The most convenient and appropriate forum of litigating those issues is the United States District Court for the Middle District of Florida.

## MOTION TO REMAND

Plaintiffs assert that, because they are not part of the Horton class, and hence are not barred by the Horton court's orders from proceeding with their claims, they are entitled to have this case remanded. Indeed, the sole basis for the removal was that an order of a federal court barred the action. As noted above, however, this court does not, and should not reach the issue of the applicability of the Horton court's orders in this matter. Rather, the action should be transferred to the Middle District of Florida for such a determination. Thus, this court cannot reach the issue presented by plaintiffs, and the motion should be denied without prejudice to their ability to reassert that claim at a later time.

## CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion to transfer this action to the United States District Court for the Middle District of Florida (Docket #5 at Civil Action No. 96-833) be granted, and that plaintiffs' motion to remand (Docket #13 at Civil Action No. 96-833) be denied.

In accordance with the Magistrates Act, 28 U.S.C. Section 636 (b)(1)(B) and (C) , and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/
KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: October 8, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. CORRIERE and
DONNA J. CORRIERE, his wife,

Plaintiffs,

v.

Civil Action No. 96-833
JUDGE LANCASTER

METROPOLITAN LIFE INSURANCE
COMPANY and JAMES D.
SPANGLER,

Defendants.

MOTION TO TRANSFER
UNDER 28 U.S.C. §1404(a)

Defendant Metropolitan Life Insurance Company ('MetLife') hereby moves under 28 U.S.C. §1404(a) to transfer this action to the United States District Court for the Middle District of Florida, Tampa Division, where the Honorable Steven D. Merryday has retained continuing jurisdiction over a nationwide class action settlement, *Horton v. Metropolitan Life Insurance Company,* Civ. No. 93-1849-CV-T-23A, in which plaintiffs Joseph and Donna Corriere are settlement class members.

The *Horton* court has issued an order permanently enjoining all *Horton* class members and their attorneys from litigating in any other forum any claims that were or could have been asserted in the *Horton* case. A transfer would avoid interference with the *Horton* court's exercise of continuing jurisdiction and would honor the terms of that court's permanent injunction order.

As grounds for this motion, MetLife states as follows:

1. The *Horton* class action was filed in the United States District Court for the Middle District of Florida, Tampa Division, on November 1, 1993.

2. On October 25, 1994, the federal court in Florida entered an order and Final Judgment in the *Horton* case approving the proposed settlement of that action and dismissing all class members' claims on the merits and with prejudice.

3. On November 8, 1995, the *Horton* court entered an Order Granting Permanent Injunction. This order permanently enjoins all *Horton* class members from litigating *Horton*-related claims in any forum other than the United States District Court for

the Middle District of Florida, Tampa Division. The order states, in part:

> To implement its previous Order and Judgment dismissing settlement class members' claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action. [11/8/95 Order, ¶ 6 (Ex. D to accompanying memorandum of law.]

4. Plaintiffs Joseph and Donna Corriere are members of the *Horton* class because (i) they purchased MetLife whole life insurance policies during the *Horton* class period, *(ii)* their claims fall within the *Horton* class definition, and *(iii)* they did not exclude themselves from the certified *Horton* settlement class.

5. Plaintiffs initiated this action with a praecipe for writ of summons in the Court of Common Pleas of Allegheny County, Pennsylvania, on or about May 8, 1995, long after the *Horton* court had certified the settlement class and entered its orders and judgment approving the settlement and dismissing all

class members' claims on the merits and with prejudice. Plaintiffs served their Complaint on April 3, 1996, almost five months after the *Horton* court had issued its permanent injunction enjoining prosecution of actions such as this one.

6. MetLife timely removed plaintiffs' case from the state court to this Court based on federal question jurisdiction: plaintiffs' state court action sought to pursue claims barred by res judicata under the Final Judgment entered in the *Horton* case, and it essentially constituted a collateral attack on the Florida federal court's orders and judgment.

7. The Notice of Removal also noted that the *Horton* court's permanent injunction bars plaintiffs and their attorneys from continuing to litigate this action in this Court or in a Pennsylvania state court. Any remedy that plaintiffs could have against defendants now lies with the *Horton* court in Florida.

8. MetLife therefore moves to transfer this case to the United States District Court for the Middle District of Florida, Tampa Division, under 28 U.S.C. § 1404(a), because that court is best situated to determine what relief, if any, is now available to

plaintiffs. Moreover, plaintiffs and their attorneys would violate the *Horton* court's permanent injunction if they were to continue litigating in this Court. The interests of justice and judicial efficiency thus support transferring this case to the Florida federal court under § 1404(a).

9. The principle of comity, which requires courts of coordinate jurisdiction and equal rank to avoid interfering in each other's affairs, also requires that this action be transferred to the Middle District of Florida. The *Horton* court expressly retained jurisdiction to resolve the issues raised by plaintiffs' case as well as all other matters relating to the administration of the class action settlement, and it has enjoined prosecution of related claims in other forums.

10. For the same reasons it removed this case to this Court, MetLife also has removed similar state-court cases filed by other *Horton* settlement class members. Four federal District Judges subsequently transferred six of those cases to Judge Merryday in Florida, recognizing that the *Horton* court was best suited to resolve any remaining issues in those actions. *[See* Exs.

G, H, I, J to accompanying memorandum of law.] MetLife respectfully submits that a transfer is appropriate here for the same reasons.

11. In support of this motion, MetLife is submitting a memorandum of law.

WHEREFORE, MetLife respectfully asks the Court to transfer this action under 28 U.S.C. § 1404(a) to the Honorable Steven D. Merryday, of the United States District Court for the Middle District of Florida, Tampa Division.

Dated: May 8, 1996

Respectfully submitted

EGLER, GARRET & EGLER

By: /s/_____

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CERTIFICATE OF SERVICE

I hereby certify that, on May 8 , 1996, true and correct copies of the above and foregoing Motion to Transfer were served by hand delivery on:

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Attorneys for Plaintiffs

and by first-class mail, postage prepaid, on:

Mr. James D. Spangler
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Pro Se

EGLER, GARRET & EGLER

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Attorneys for Defendant
Metropolitan Life Insurance
Company

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| IN RE THE METROPOLITAN LIFE INSURANCE COMPANY SALES PRACTICES LITIGATION | Misc. Docket No. 96-179<br>MDL No. 1091 |
| THIS DOCUMENT RELATES TO: | |
| COULTER v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 94-0629 | Judge Lancaster<br>Magistrate Judge Benson |
| and | |
| ROSTEK v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 94-1108 | |

MOTION TO TRANSFER
UNDER 28 U.S.C. § 1404(a)

Defendant Metropolitan Life Insurance Company ("MetLife") hereby moves under 28 U.S.C. § 1404 (a) to transfer the actions captioned *Coulter v. Metropolitan Life Insurance Company,* No. 94-0629, and *Rostek v. Metropolitan Life Insurance Company,* No. 94-1108, to the United States District Court for the Middle District of Florida, Tampa Division, where the Honorable Steven D. Merryday has retained continuing jurisdiction over a

nationwide class action settlement, *Horton v. Metropolitan Life Insurance Company*, Civ. No. 93-1849-CIV-T-23A, in which certain named plaintiffs and putative class members in the *Coulter and Rostek* cases are settlement class members.

The *Horton* court has issued an order permanently enjoining all *Horton* settlement class members and their attorneys and representatives from litigating in any other forum any claims that were or could have been asserted in the *Horton* case. A transfer would avoid interference with the *Horton* court's exercise of continuing jurisdiction and would honor the terms of that court's permanent injunction order. Once the Florida federal court has resolved issues relating to *Horton class* membership and the scope of the permanent injunction order, the cases may be transferrable back to this Court.

As grounds for this motion, MetLife states as follows:

1. The *Horton* class action was filed in the United States District Court for the Middle District of Florida, Tampa Division, on November 1, 1993.

2. On April 22, 1994, after the parties reached a

proposed settlement, the Horton court certified a nationwide settlement class consisting of:

> all person who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of MetLife between January 1, 1990 and October 31, 1993.

[4/22/94 Order on Class Certification ¶ 1 (Ex. A to accompanying memorandum of law).]

3. On October 25, 1994, the *Horton* court entered an order and Final Judgment in the *Horton* case approving the proposed settlement of that action and dismissing all class members' claims on the merits and with prejudice.

4. On November 8, 1995, the *Horton* court entered an Order Granting Permanent Injunction. This order permanently enjoins all *Horton* class members and their attorneys from litigating *Horton*-related claims in any forum other than the United States District Court for the Middle District of Florida, Tampa Division.

The order states, in part:

> To implement its previous Order and Judgment dismissing settlement class members' claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action. [11/8/95 Order, ¶ 6 (Ex. F to accompanying memorandum of law).]

5. The *Coulter* action was filed on or about March 25, 1994, almost five months after the *Horton* case commenced. The Coulter Complaint, as amended, lists 15 named plaintiffs and purports to assert claims on behalf of a putative "class" and "subclass." The putative "subclass" consists of:

> all Pennsylvania residents who purchased from [MetLifel a "50/50 Savings Plan," a "State Street Wealth Accumulation Plan," an "Individual Retirement Benefit Plan," a "Nurse's Insured Retirement Plan," a "Nurse's Guaranteed Retirement Plan," a "Tax Advantaged Bonus Plan," an "Enricher Insured Savings Plan," and/or any retirement and/or savings plan, which each [*sic*] was purported to have life insurance "components," but which in reality were [*sic*] nothing more than life insurance policies. [Second

Amended Complaint ¶ 35.]

The Complaint alleges that MetLife "intentionally sold policies of life insurance as a retirement and/or savings plan for the insured, with a life insurance component, to consumers that were interested in purchasing a savings plan and/or a retirement plan, not life insurance. The customers did not get what they had bargained for." [*Id.* ¶ 43.]

6. The *Rostek* case was filed on or about June 30, 1994, some three months later, by the same attorneys who had filed the Coulter action. The Complaint, as apparently amended by the subsequent motion for class certification, purports to assert claims on behalf of five named plaintiffs and a putative class consisting of:

> All Pennsylvania residents who have purchased "college savings plans," which in reality were only large MetLife life insurance policies on children under eighteen years of age, in an amount in excess of $10,000.00." [Proposed Order, ¶ 1.]

Like the *Coulter* Complaint, the *Rostek* Complaint charges that MetLife "intentionally sold life insurance policies as a college savings plan to consumers that were interested in purchasing a

college savings plan for their child, not life insurance. The customers did not get what they had bargained for." [Complaint ¶ 4.]

7. As these proposed class definitions and claims demonstrate, certain named plaintiffs and putative class members in the *Coulter and Rostek* cases are members of the *Horton* settlement class because (*i*) they purchased MetLife whole life insurance policies during the *Horton* class period, (*ii*) they claim to have purchased their life insurance policies as retirement and/or other savings plans or vehicles, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that those plans were life insurance products, and (*iii*) they did not exclude themselves from the certified Horton settlement class.[10]

8. To the extent that certain named plaintiffs and

---

[10] The *Coulter* plaintiffs allege that the "subclass" in that case includes "thousands of person." [Complaint ¶ 44.] MetLife therefore assumes that the "subclass" includes persons who were members of the *Horton* class but did not file timely exclusion requests, because only 97 Pennsylvania residents timely excluded themselves from the *Horton* class.

putative class members in the *Coulter and Rostek* cases fall within the *Horton* settlement class, their claims are barred by res judicata under the Final Judgment entered in the *Horton* case, and the *Horton* court's permanent injunction order enjoins them from continuing to litigate these actions in this Court. Any remedy those plaintiffs could have against MetLife now lies with the Horton court in Florida.

9. MetLife therefore moves to transfer the Coulter *and Rostek* cases to the United States District Court for the Middle District of Florida, Tampa Division, under 28 U.S.C. § 1404(a). That court has retained jurisdiction to enforce the *Horton* settlement, and it is best situated to determine what relief - if any - is available to the plaintiffs and putative class members who fall within the *Horton* class. Moreover, those plaintiffs - as well as their attorneys and purported representatives in these cases would violate the *Horton* court's permanent injunction if they were to continue litigating in this Court. The interests of justice and judicial efficiency thus support: transferring the cases to the Florida federal court under § 1404 (a).

10. The principle of comity, which requires courts of coordinate jurisdiction and equal rank to avoid interfering in each other's affairs, also requires a transfer to the Middle District of Florida. The *Horton* court expressly retained jurisdiction to resolve the issues raised by the plaintiffs' cases as well as all other matters relating to the administration of the class action settlement, and it has enjoined prosecution of related claims in other forums.

11. Four other federal District Judges have transferred six other cases filed by *Horton* class members to Judge Merryday in Florida, recognizing that the *Horton* court was best suited to resolve all *Horton*-related issues in those actions. [*See* Exs. 0, P, Q, R to accompanying memorandum of law.] MetLife respectfully submits that a transfer is appropriate here for the same reasons.

12. The pendency of the consolidated multidistrict litigation in this Court does not preclude at least a temporary transfer to the *Horton* court. The Judicial Panel on Multidistrict Litigation frequently declines to consolidate cases that have proceeded to judgment (as have the *Horton* case and the claims of *Horton* settlement class members) or are otherwise far advanced.

Similarly, the Panel frequently transfers settlement class members' individual cases to the court that has approved a class action settlement (as the *Horton* court has done).

13. In support of this motion, MetLife is submitting a memorandum of law.

WHEREFORE, MetLife respectfully asks the Court to transfer the *Coulter and Rostek* actions under 28 U.S.C. 5 1404(a) to the Honorable Steven D. Merryday, of the United States District Court for the Middle District of Florida, Tampa Division.

Respectfully submitted

/s/

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Dated: March 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that, on March 28, 1996, true and correct copies of the above and foregoing Motion to Transfer was served upon the following counsel in the manner indicated:

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/s/
Jack Cobetto

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOUGLAS A. SMITH,

Plaintiff, Civil Action No. 96-453

v.

METROPOLITAN LIFE INSURANCE COMPANY and JEFFREY J. RODGERS,

Defendants.

DOUGLAS A. SMITH,

Plaintiff,

V.

ROBERT MARTINI,

Defendant.

MOTION TO TRANSFER
UNDER 28 U.S.C. § 1404(a)

Defendant Metropolitan Life Insurance Company ("MetLife") hereby moves under 28 U.S.C. § 1404(a) to transfer this action to the United States District Court for the Middle

District of Florida, Tampa Division, where the Honorable Steven D. Merryday has retained continuing jurisdiction over a nationwide class action settlement, *Horton v. Metropolitan Life Insurance Company*, Civ. No. 93-1849CV-T-23A, in which plaintiff Douglas A. Smith is a settlement class member.

*The Horton* court has issued an order permanently enjoining all *Horton* class members and their attorneys from litigating in any other forum any claims that were or could have been asserted in the *Horton* case. A transfer would avoid interference with the *Horton* court's exercise of continuing jurisdiction and would honor the terms of that court's permanent injunction order.

As grounds for this motion, MetLife states as follows:

1. The *Horton* class action was filed in the United States District Court for the Middle District of Florida, Tampa Division, on November 1, 1993.

2. On October 25, 1994, the federal court in Florida entered an order and Final Judgment in the *Horton* case approving the proposed settlement of that action and dismissing all class

members' claims on the merits and with prejudice.

3. On November 8, 1995, the *Horton* court entered an Order Granting Permanent Injunction. This order permanently enjoins all *Horton* class members from litigating *Horton*-related claims in any forum other than the United States District Court for the Middle District of Florida, Tampa Division. The order states, in part:

> To implement its previous Order and Judgment dismissing settlement class members' claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action. [11/8/95 Order, ¶ 6 (Ex. D to accompanying memorandum of law.]

4. Plaintiff Douglas A. Smith is a member of the *Horton* class because (*i*) he purchased a MetLife whole life insurance policy during the *Horton* class period, (*ii*) his claims fall within the *Horton* class definition, and (*iii*) he did not exclude himself from the certified *Horton* settlement class.

5. In October 1995, one year after the *Horton* court entered its order and judgment dismissing class members' claims, plaintiff initiated this action with a writ of summons in the Court of Common Pleas of Allegheny County, Pennsylvania. No Complaint has yet been filed.

6. On February 13, 1996, plaintiff filed a Motion to Consolidate his state-court suit against MetLife and one of the individual defendants with a subsequently filed state-court suit against another individual defendant. This motion made clear for the first time that plaintiff's claims fall within the *Horton* class definition.

7. MetLife timely removed plaintiff's case from the state court to this Court based on federal question jurisdiction: plaintiffs state-court action sought to pursue claims barred by res judicata under the Final Judgment entered in the *Horton* case, and it essentially constituted a collateral attack on the Florida federal court's orders and judgment.

8. The Notice of Removal also noted that the *Horton* court's permanent injunction bars plaintiff and his attorneys from

continuing to litigate this action in this Court or in a Pennsylvania state court. Any remedy that plaintiff could have against defendants now lies with the *Horton* court in Florida.

9. MetLife therefore moves to transfer this case to the United States District Court for the Middle District of Florida, Tampa Division, under 28 U.S.C. § 1404(a), because that court is best situated to determine what relief, if any, is now available to plaintiff. Moreover, plaintiff and his attorneys would violate the *Horton* court's permanent injunction if they were to continue litigating in this Court. The interests of justice and judicial efficiency thus support transferring this case to the Florida federal court under § 1404(a).

10. The principle of comity, which requires courts of coordinate jurisdiction and equal rank to avoid interfering in each other's affairs, also requires that this action be transferred to the Middle District of Florida. The *Horton* court expressly retained jurisdiction to resolve the issues raised by plaintiff's case as well as all other matters relating to the administration of the class action settlement, and it has enjoined prosecution of related claims in

other forums.

11. For the same reasons it removed this case to this Court, MetLife also has removed similar state-court cases filed by other *Horton* settlement class members. Four federal District Judges subsequently transferred six of those cases to Judge Merryday in Florida, recognizing that the *Horton* court was best suited to resolve any remaining issues in those actions. [*See* Exs. H, I, J, K to accompanying memorandum of law.] MetLife respectfully submits that a transfer is appropriate here for the same reasons.

12. In support of this motion, MetLife is submitting a memorandum of law.

WHEREFORE, MetLife respectfully asks the Court to transfer this action under 28 U.S.C. § 1404(a) to the Honorable Steven D. Merryday, of the United States District Court for the Middle District of Florida, Tampa Division.

Dated: March 14, 1996

Respectfully submitted

EGLER, GARRETT & EGLER

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that, on March 14, 1996, true and correct copies of the above and foregoing Motion to Transfer were served upon the following listed persons by hand delivery:

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and by first-class mail, postage prepaid, on:

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Metropolitan Life Insurance
Company

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, at al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

ORDER GRANTING PERMANENT INJUNCTION

Before the Court is a motion by defendant Metropolitan Life Insurance Company ("MetLife") seeking a permanent injunction under the All-Writs Act, 28 U.S.C. § 1651(a), against Charles F. Harrison, Jr., Leroy Wayne McGallager, and Sunny Eppes Solomon, who have filed individual lawsuits against MetLife in Alabama. The motion was fully briefed by all parties and was the subject of a hearing before the Special Master on July 24, 1995. After the hearing, the parties were permitted to make

additional submissions.

Based on the foregoing, and on the Court's overall familiarity with the litigation and settlement of this class action,

IT IS HEREBY ORDERED that:

1. Charles F. Harrison, Jr., Leroy Wayne McGallager, and Sunny Eppes Solomon (collectively, the 'Alabama plaintiffs') are hereby determined to be members of the settlement class previously certified in this action because (*i*) they purchased their MetLife whole life insurance policies from Metlife's Tampa, Florida sales office between January 1, 1988 and October 31, 1993, or from other MetLife sales offices between January 1, 1990 and October 31, 1993, during the class period, (*ii*) they bought their policies as retirement and/or other savings plans or vehicles, based in whole or in part an written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, and (*iii*) they did not timely exclude themselves from the settlement class.

2. This Court previously entered an Order and Final Judgment under Fed. R. Civ. P. 54(b) releasing MetLife and its

officers, directors, employees, agents, representatives, and its predecessors, successors, parents, subsidiaries, partners, corporate affiliates, successors in interest and assigns, together with the respective past, present and future officers, directors, employees, agents and representatives of any or all of them (collectively, "MetLife and its Affiliates"), from any and all claims or cause of action that (*i*) have been or could have been asserted in this action or (*ii*) have been, could have been, may be or could be alleged by any settlement class member against MetLife and its Affiliates on the basis of, connected with, arising out of, or related in whole or in part to any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, described or referred to in this action or that are related to sales solicitations described in the Second Amended Complaint in this action (the 'Sales Solicitations") or the purchase of Whole Life Policies (defined as policies designed by MetLife as Whole Life, Life Paid Up at 95 or Life Paid Up at 98), including without limitation any and all claims for damages, rescission, equitable and legal relief, attorneys, fees, costs or disbursements incurred by any

person or entity in connection with or related in any manner to this action, the settlement thereof, the administration of this settlement, the Sales Solicitations or the purchase of Whole Life Policies; provided, however, that nothing in that prior Order was intended to bar any action to enforce the parties' Settlement Agreement in accordance with its terms.

3. The Court also dismissed all claims of plaintiffs and settlement class members on the merits and with prejudice, and it retained jurisdiction to administer the settlement and enforce its orders and Judgment.

4. Based an its prior Orders and Judgment, the Court hereby determines that the Alabama plaintiffs' claims have been discharged and dismissed with prejudice and on the merits and that the Court's rulings are res judicata as to those claims.

5. The Alabama plaintiffs and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, are hereby permanently enjoined from pursuing in the Alabama courts, or any forum other than this Court, any claims that were or could

have been raised in this action, and from taking any further action in the Alabama courts other than filing voluntary notices of dismissal of their individual actions on the merits and with prejudice.

6. To implement its previous order and Judgment dismissing settlement class members, claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action.

7. MetLife is hereby ordered to abide by its offer to grant the Alabama plaintiffs the opportunity to apply for the same settlement relief provided to eligible settlement class members, i.e., a refund of net premiums plus interest as specified in the Settlement Agreement, or a MetLife Growth Plus Annuity, notwithstanding the expiration of the claim-filing period. If the

Alabama plaintiffs wish to take advantage of this offer, they must file Proof of Claim Forms in substantially the same form as those previously approved by the Court, not later than 30 days from the date of this Order.

8. The injunctions issued in this order are authorized by the All-Writs Act, 28 U.S.C. § 1651(a), and the Anti-Injunction Act, 28 U.S.C. § 2283, because they are necessary to protect and effectuate this Court's Final Judgement and are necessary in aid of this court's continuing jurisdiction.

IT IS SO ORDERED in Chambers in Tampa, Hillsborough County,

Florida this 8th day of November, 1995.

/s/
Steven 0. Merryday
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

VS. CIV. No. 93-1849-CIV-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTIONS TO INTERVENE AND TO DISMISS NOTICES OF INTENTION TO APPEAR AND OBJECT

Before the Court are the following: (1) a motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes (the "former sales managers"), filed on May 12, 1994; (2) a motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters"), filed on May 23, 1994; and (3) a motion by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106) to dismiss the various notices of intention to appear and object to the proposed class

settlement filed by the former sales managers (excluding Mr. Ferrandes) (Docket No. 58), by Kevin J. Daxon ("Daxon") (Docket No. 89), and by Daniel Richard Urso ("Urso") (Docket No. 94).

These motions were briefed, and affidavits were submitted. The Court heard oral argument at the July 18, 1994 hearing on the fairness of the proposed settlement.[1] Upon consideration of the papers submitted and arguments made, the Court denied the intervention motions and determined that Daxon and Urso do not have standing to object to the proposed settlement.[2] In accordance

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[1]The former sales managers moved for leave to file a reply brief in support of their motion to intervene, and they tendered a proposed reply brief with the motion. (Docket No. 90.) Leave to file a reply brief is granted; the reply brief has been considered by the Court. In addition, plaintiffs moved to supplement their response to the motion to intervene. (Docket No. 108.) This motion also is granted, as ordered below, and the supplemental material has been considered by the Court.

[2] At the July 18 hearing, counsel for the former sales managers (except Mr. Ferrandes) did not assert their clients, alleged standing to raise their previously filed objections. Instead, counsel spoke only on behalf of Daxon. After the Court's bench ruling on Daxon's lack of standing, however, the parties and the former sales managers stipulated on the record that the former sales managers were not settlement class members.

with and in support of the determinations made at the hearing, the Court makes the following findings of fact and conclusions of law.

## FINDINGS OF FACT

### Factual Background

1. Plaintiffs' central allegation in this case is that they and other members of the settlement class purchased whole life insurance policies issued by Metropolitan Life Insurance Company ("MetLife") as retirement and/or other savings plans or vehicles as a result of written or other sales solicitations that allegedly did not fully disclose that the product being sold was life insurance.

2. The complaint in this action was filed in November 1993 and was widely publicized in the press, particularly in the Tampa Bay area.

3. In April 1994, plaintiffs and MetLife agreed to a proposed settlement of this action and entered into a Settlement Agreement.

4. On April 22, 1994, this Court issued its Order with respect to Class Certification, Notice, and Settlement Hearing (Docket No. 48), certifying a settlement class consisting of:

all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from

(a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or

(b) any other sales office of MetLife between January 1, 1990 and October 31, 1993.

5. The April 22 Order also approved forms of individual and publication notice and a proof of claim form. The proof of claim form required settlement class members who sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.)

**The Coulters**

14. The Coulters are the named plaintiffs in an action originally filed on or about March 25, 1994, in the Court of Common Pleas of Allegheny County, Pennsylvania, but now pending after removal in the United States District Court for theWestern District of Pennsylvania, Civil Action No. 94-0629. (Their complaint is attached as Exhibit 2 to Docket No. 77.)

15. The Coulters' Pennsylvania action asserts, inter alia, claims on behalf of a putative "subclass" of Pennsylvania residents who allegedly were solicited to purchase MetLife whole life insurance policies as savings and/or retirement plans. These allegations are substantially the same as those asserted by plaintiffs in this action.

16. The Coulters did not file a proposed complaint with their intervention motion, as required by P2d. R. Civ. P. 24(c). Instead, they sought to have "all Pennsylvania residents . . . severed [from this action] and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action" against MetLife. Alternatively, the Coulters asked

"that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law." (Docket No. 77, at 1-2.)

17. The Coulters have not yet moved for class certification in Pennsylvania. Nor have they sought to have their attorney appointed as class counsel. MetLife has filed a motion to dismiss the Coulters' amended complaint, and that motion is pending before the federal district court in Pennsylvania.

18. As of June 8, 1994, approximately 800 Pennsylvania settlement class members had filed proofs of claim, even though the deadline for filing was not until June 30, 1994.

19. The Coulters asserted that, in January or February 1993, they purchased a MetLife whole life insurance policy that allegedly had been represented as a retirement or savings plan. (Pennsylvania Complaint ¶ 30-36.) They also claimed they purchased the insurance in part on the basis of sales solicitations that allegedly "failed to disclose that the solicitation was intended to propose insurance . . . . 11 (Id. ¶ 31-32.) These allegations place the Coulters, as individuals, within the settlement class certified by this Court.

**Timing of Intervention Motions**

20. Before the former sales managers and the Coulters filed their intervention motions on May 12 and 23, respectively, plaintiffs and MetLife had already entered into a settlement agreement, and this Court had preliminarily approved that agreement as sufficiently reasonable, adequate and fair to warrant notice to members of the settlement class. Following entry of the Court's April 22, 1994 Order granting preliminary approval, individual notice and claim forms were mailed to approximately 71,000 potential settlement class members, and notice was published in newspapers and magazines with a combined circulation in excess of 7 million. (Docket No. 144, 149.)

## CONCLUSIONS OF LAW

**Intervention as of Right**

21. Absent an express statutory right to intervene (which the would-be intervenors do not assert), an applicant may not intervene as of right under Fed. R. Civ. P. 24(a) (2) unless:

(1) the application to intervene is timely; (2) the

> applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) the applicant's interest will not be represented adequately by the existing parties to the suit.

ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1321 (11th Cir. 1990).

22. An applicant must meet all four criteria to intervene under Rule 24(a)(2). Id.; accord Washington Elec. Corp., Inc. v. Massachusetts Mun. Wholesale Elec., Co., 922 F.2d 92, 96 (2d Cir. 1990). The Court has considered each of the four factors as follows.

The Coulters

42. The Court next considers the four Rule 24(a)(2) requirements in connection with the Coulters' motion to intervene.

43. Interest and Impairment of Interest: Because the Coulters are settlement class members, they have a legally protectable interest in the subject of this action. This Court's April 22, 1994 Order, however, allowed the Coulters -- and any other dissatisfied Pennsylvania residents within the settlement class -- to

opt out of the settlement class and litigate elsewhere if they chose to do so. Thus, the Coulters and other Pennsylvania residents cannot claim that the disposition of this action would unduly impede or impair their interests if intervention were denied. See, e.g., Roberts v. Heim, [1989] Fed. Sec. L. Rep. (CCH) 1 94,394, at 92,555 (N.D. Cal. Mar. 30, 1989) (denying intervention to class members because they "can exercise their right to opt out . . . and thereby avoid being bound by the judgment"); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 289 (N.D. Cal. 1976) (same).

44. In the alternative, the Court's order gave the Coulters the opportunity to remain in this class action and object to the settlement, and to appear at the fairness hearing themselves or through their own attorney. See Fed. R. Civ- P. 23(c)(2)(c). The Coulters appeared through their own attorney at the fairness hearing.

45. As settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights. See, e. g., Webcor Elec.

Inc. v. Whiting, 101 F.R.D. 461, 466 (D. Del. 1984) (denying intervention to shareholders because they could object at fairness hearing); Officers for Justice v. Civil Serv. Comm'n, 473 F. Supp. 901, 829-30 (N.D. Cal. 1979) (denying intervention to class members who had opportunity to object at fairness hearing), aff'd, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); Alaniz v. California Processors Inc., 73 F.R.D. 289, 295 (N.D. Cal. 1976), aff'd sub nom. Alaniz v. Tillie Louis Foods, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978).

46. **Adequacy of Presentation:** The Court also rejects the Coulters' argument that plaintiffs cannot or will not adequately represent their interests. The Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations used to sell whole life insurance as retirement and/or savings plans or vehicles.

47. Nor can the Coulters justify their motion by arguing that their claims are factually and legally distinct from those in this action and that Rule 23(a)'s requirements of commonality, typicality and adequacy of representation are not satisfied as to the

putative subclass they allege. These contentions ignore that the parties have presented the Court with a settlement and that Rule 23's requirements "may be more easily satisfied in the settlement context than in the more complex litigation context." Dalkon Shield Claimants Comm. v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co.), 85 B.R. 373, 378 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989); see also Bowling v. Pfizer, Inc., 143 F.R.D. 141, 157-58 (S.D. Ohio 1992).

48. Timeliness: The Court questions whether the Coulters' intervention motion is timely under the factors articulated in Reeves, 754 F.2d at 968-69. The Coulters filed their Pennsylvania action on or about March 25, 1994; they therefore knew of their claims before that date. Moreover, in light of the extensive national publicity that this case and MetLife's sales solicitations received, the Coulters quite likely knew or should have known about this action when they filed their Pennsylvania suit. Yet the Coulters did not move to intervene here until May 23 -- well after the Court had preliminarily approved the proposed settlement and individual notice had been mailed to potential settlement class.

49. The Court need not decide, however, whether the Coulters' intervention motion was timely because the motion fails to satisfy two of the other four Rule 24(a)(2) requirements: impairment of interest and inadequacy of representation. As discussed above, a prospective intervenor must meet all four of those requirements to intervene as of right. ManaSota-88, Inc., 896 F.2d at 1321; accord Washington Elec. Coop., Inc., 922 F.2d at 96. In addition, denial of intervention would in no way prejudice the Coulters because (i) they had an opportunity to exclude themselves from the settlement class or object to the proposed settlement and (ii) they actually entered an appearance in this case.

50. The Court therefore concludes that the Coulters cannot intervene as of right because they have not met Rule 24(a)(2)'s requirements. Moreover, their motion is defective for several other reasons.

51. **Asserted Right to Represent Other Pennsylvania Residents**: The Coulters' attempt to exclude all Pennsylvania residents from the settlement class is improper. Just as the Coulters had the right to participate in or opt out of the settlement

class, so did every other settlement class member who resides in Pennsylvania. The Coulters have no authority unilaterally to make that decision for all other Pennsylvania settlement class members. See 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 16.16 at 16-90 (3d ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class member and may not be usurped by the class representative or class counsel") (emphasis added). The type of group or mass opt-out that the Coulters seek therefore is improper -- especially where so many Pennsylvania residents already have filed claim forms expressing their desire to participate in the proposed settlement. See, e. g., Carlough v. Amchem Prods., Inc., 10 F.3d 189, 203-04 (3d Cir. 1993) (discussing class members' right to opt out only on an individual basis, and noting that "a mass opting out . . . clearly would be disruptive to the district court's ongoing settlement management").

52. The Coulters' attempt to "sever" or exclude all Pennsylvania residents from the settlement class also is particularly inappropriate because the Coulters have not been determined to be

adequate representatives of the absent Pennsylvania members of the settlement class (or of any other putative class); nor have their attorneys been found to be adequate class counsel. The Coulters therefore have no right to speak for the putative subclass they allege or to force the putative subclass members' withdrawal from the settlement class certified in this action.

53. **Due Process:** The Coulters' claim that this Court's application of Florida law to Pennsylvania residents would violate due process is unfounded. The Court has not applied Florida law to Pennsylvania residents' claims; nor has it attempted to adjudicate the merits of plaintiffs' claims. The only issue before the Court is the fairness and adequacy of the settlement -- an issue controlled by federal law governing settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice-of law principles. In addition, if the Coulters and other Pennsylvania residents believed that Pennsylvania law gave them a greater potential recovery than would be available to other settlement class members, they could have excluded themselves from the settlement

class.

54. **Procedural Defect**: Intervention also is denied because the Coulters did not attach a pleading as required by Rule 24(c) "setting forth the claim or defense for which intervention is sought." The failure to attach a pleading is especially significant here because the Coulters do not even attempt to assert a claim or defense; rather, they seek to intervene so they can "sever" themselves and all other Pennsylvania residents from the case.

**Permissive Intervention**

55. Where an applicant may not intervene as of right under Rule 24(a)(2), the Court nevertheless has discretion to permit intervention under Rule 24(b)(2) if the application is timely and if

> an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2); see, e.g., ManaScota-88, Inc., 896 F.2d at 1323.

56. "[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a

common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." Worlds, 929 F.2d at 595 (quotations omitted).

**The Coulters**

64. As discussed above, the Coulters' intervention motion might be untimely. But more importantly, the procedures adopted by the Court for potential class members to object or exclude themselves from the settlement class already offer the Coulters all the relief they seek for themselves and other Pennsylvania settlement class members. granting permissive intervention thus would serve no purpose where the would-be intervenors wish only to "sever" themselves from the action and already have the right to do so. (As discussed above, however, the Coulters' unilateral attempt to "sever" other Pennsylvania settlement class members is improper.)

In Tampa, Florida, on October 25th, 1994.

/s/
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD S. COULTER and
ANISSA COULTER, his wife,
Residents of Pennsylvania,
on behalf of themselves and
all other persons similarly
situated,

Plaintiffs, Civil Action No. 94-0629

v.

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

ORDER OF COURT

AND NOW, this 23rd day of September, 1994, upon consideration of Plaintiffs' Motion for Leave to Amend Class Action Complaint (Document No. 21) and Defendant's Motion to Stay Proceedings Pending Ruling on Proposed Settlement (Document No. 11), it is hereby ORDERED that:

1. Plaintiffs' Motion for Leave to Amend Class Action Complaint (Document No. 21) is GRANTED. The Complaint shall

be filed on or before October 24, 1994.

2. Defendant shall answer or otherwise plead in response to the Second Amended Complaint on or before November 23, 1994.

3. Defendant's Motion to Stay Proceedings Pending Ruling on Proposed Settlement (Document No. 11) is GRANTED. Except for the filing and service of the Second Amended Complaint and any response thereto, all matters in this action are stayed pending disposition of all proceedings involving Plaintiffs in the case currently pending in the United States District Court, Middle District of Florida, Tampa Division, captioned Horton v. Metropolitan Life Insurance Company, C.A. No. 93-1849-CIV-T-23A.

/s/
Donald J. Lee
United States District Judge

cc: Kenneth R. Behrend
Behrend & Ernsberger
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Pittsburgh, PA 15219

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Sarah E. Davies
Morgan, Lewis & Bockius
2000 One Logan Square
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD S. COULTER, and ANISSA COULTER, his wife, TAMMI BAZY, MICHELLE BLUM, BETH RAIBLE, SHELLEY DAUGHENBAUGH, FRIEDA KAMEL, PATRICIA FREY, CHRISTOPHER CLANCY, JOYCE MCCANDLESS, DIANA JOHNSON, ROBERT HEMCHER, GERALD DEARMITT, and ADA DEARMITT, his wife, and ANGELO RECUPERO, Residents of Pennsylvania, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

CIVIL DIVISION
NO: 94-0629

SECOND AMENDED CLASS ACTION COMPLAINT

SECOND AMENDED CLASS ACTION COMPLAINT

AND NOW, come the Plaintiffs, Ronald S. Coulter, and Anissa Coulter, his wife, Tammi Bazy, Michelle Blum, Beth Raible, Shelley Daughenbaugh, Frieda Kamel, Patricia Frey, DeArmitt, and Ada DeArmitt, his wife, and Angelo Recupero, by

and through their attorney, Kenneth R. Behrend, and the Law Firm of Behrend and Ernsberger and file the following Second Amended Class Action Complaint in Civil Action, stating the following:

## THE PARTIES

1. Representative Plaintiff, Ronald S. Coulter, is an individual who is a resident of Pennsylvania and at all times material hereto resided in Butler, PA. Ronald Coulter was the owner and the named insured of MetLife whole life insurance policy number 935 000 470 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

2. Anissa Coulter, wife of Ronald S. Coulter is an individual who is a resident of Pennsylvania and at all times material hereto resided in Butler, PA. Anissa Coulter was the intended beneficiary of MetLife whole life insurance policy number 935 000 470 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

3. Representative Plaintiff Tammi Bazy is an individual who is a resident of Pennsylvania and at all times

material hereto resided in Glenshaw, PA. Tammi Bazy is the owner and the named insured of MetLife whole life policy number 935 303 601 PR, which contains language which was not approved by the Pennsylvania Insurance Commission.

4. Representative Plaintiff Michelle Blum is an individual who is a resident of Pennsylvania and at all times material hereto resided in Pittsburgh, PA. Michelle Blum is the owner and the named insured of MetLife whole life policy number 935 205 686 PR, which contains language which was not approved by the Pennsylvania Insurance Commission.

5. Representative Plaintiff Beth Raible is an individual who is a resident of Pennsylvania and at all times material hereto resided in Glenshaw, PA. Beth Raible is the owner and the named insured of MetLife whole life policy number 925 608 831 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

6. Representative Plaintiff Shelley Daughenbaugh is an individual who is a resident of Pennsylvania and at all times material hereto resided in Mechanicsburg, PA. Shelley

Daughenbaugh is the owner and the named insured of MetLife whole life insurance policy number 934 901 403 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

7. Representative Plaintiff Frieda Kamel is an individual who is a resident of Pennsylvania and at all times material hereto resided in Pittsburgh, PA. Frieda Kamel is the owner and the named insured of MetLife Life 95 life policy number 915 908 135 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

8. Representative Plaintiff Patricia Frey is an individual who is a resident of Pennsylvania and at all times material hereto resided in Allison Park, PA. Patricia Frey is the owner and the named insured of MetLife Flexible Premium Life policy number 903 143 699 UL, and MetLife Flexible Premium Multifunded Life policy number 935 404 879 UM, both of which contain language which was not approved by the Pennsylvania Insurance Commission.

9. Representative Plaintiff Christopher Clancy is an

individual who is a resident of Pennsylvania and at all times material hereto resided in Carnegie, PA. Christopher Clancy is the owner and the named insured of MetLife Life 98 whole life policy number 925 206 290 E1.

10. Representative Plaintiff Joyce McCandless is an individual who is a resident of Pennsylvania and at all times material hereto resided in Butler, PA. Joyce McCandless is the owner and the named insured of MetLife Flexible Premium Multifunded Life policy number 935 601 492 UM, which contains language which was not approved by the Pennsylvania Insurance Commission.

11. Representative Plaintiff Diana Johnson is an individual who is a resident of Pennsylvania and at all times material hereto resided in Bethel Park, PA. Diana Johnson is the owner and the named insured of Whole Life policy number 916 003 683 PR, which contains language which was not approved by the Pennsylvania Insurance Commission.

12. Representative Plaintiff Robert Hemcher is an individual who is a resident of Pennsylvania and at all times

material hereto resided in Pittsburgh, PA. Robert Hemcher is the owner and the named insured of Life 95 policy number 925 903 820 PR, and Whole Life policy number 935 701 768 PR, both of which contain language which was not approved by the Pennsylvania Insurance Commission.

13. Representative Plaintiffs Gerald DeArmitt, and Ada DeArmitt, his wife, are individuals who are residents of Pennsylvania and at all times material hereto resided in Butler, PA. Gerald and Ada DeArmitt are the named insureds of MetLife Survivorship Whole Life policy 916 001 790 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

14. Representative Plaintiff Angelo Recupero is an individual who is a resident of Pennsylvania and at all times material hereto resided in Kittanning, PA. Angelo Recupero is the owner and the named insured of MetLife whole life policy number 935 903 035 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

15. Defendant, Metropolitan Life Insurance Company,

(MetLife), is an insurance company licensed in the Commonwealth of Pennsylvania to sell life insurance, with offices throughout Pennsylvania and an administrative office located at 500 Schoolhouse Road, Johnstown, PA 15904-1097 and with corporate headquarters at 1 Madison Avenue, New York, NY 10010.

## CLASS ACTION ALLEGATIONS

16. This class action is brought on behalf of all of the Pennsylvania residents who purchased from MetLife Insurance Company (hereinafter "MetLife"), life insurance policies or annuities which said policies or contracts covering life insurance or annuities were not formally approved by the Pennsylvania Insurance Commissioner.

17. The policies or contracts covering life insurance or annuities which were not formally approved by the Pennsylvania Insurance Commissioner, include, but are not limited to the following:

A. Whole Life Policy (7-87) and Life to 95 (57-87)

issued after June 12, 1991, which did not contain the approved policy language that provided consumers notice that: "you may ask us to pay premiums with a combination of yearly dividends, the cash value to any paid-up additions and/or any dividend accumulations. As long as these values are great enough, out-of-pocket premiums need not be paid to keep your policy in force."; and

B. Survivorship Whole Life Policy (2j-90 PA) containing unapproved language on page one (1), concerning Supplemental Insurance Benefit and Split Policy Option, that were issued subsequent to October 23, 1990; and

C. Flexible Premium Life Insurance Policy (7UL-90) which contained the limited, unapproved, disclosure language on the Policy Specification Page that :"The Planned Premium shown below may need to be increased to keep this policy and coverage in force.". MetLife did not include the Insurance Commission's required additional disclosure language: "Even if coverage continues, the amount payable on the final date of policy may have little or no value."; and

D. Multifunded Flexible Premium Life Policy (7.6FM-90), which contained additional Insurance Commission unapproved policy language on pages 1, 3, 3.1, and 5; and

E. All life and annuity policy forms which contained unapproved non-guaranteed illustrated value tables bound in with the policy pages.

18. Common questions of law and fact affect the rights of each member of the class and a common relief by way of damages for the Plaintiff class is sought.

19. Among the predominating common questions of fact and law with reference to the Representative and class Plaintiffs are:

A. Did MetLife's sale of the above referenced policies or annuities in paragraph 16, violate Sections 201-2(4) (ii), (v), (vii), (ix), (xiv) and (xvii) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. Sect. 201-2(4)?

B. Whether MetLife's sale of insurance and annuities as set forth in this complaint that were not approved by the Commonwealth of Pennsylvania's Insurance Commission,

violated Sections 201-2(4) (ii), (v), (vii), (xiv) and (xvii) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. Sect. 201-2(4)?

C. Whether MetLife and its agents had knowledge of the scheme to sell unapproved policies or annuities to Pennsylvania consumers?

D. Whether MetLife and its agents exercised good faith and fair dealing in the performance of its contractual obligations to the purchasers of the unapproved policies and/or annuities as set forth above?

E. Whether MetLife and its agents violated their fiduciary duty towards the purchasers of the unapproved policies and/or annuities as set forth above, by not informing them directly that the policies and/or annuities were not approved by the Pennsylvania Insurance Commission and that they were required to first get the approval of the Pennsylvania Insurance Commission, prior to selling the policy and/or annuity?

F. Whether MetLife and its agents were under a duty to inform the purchasers of the unapproved policies and/or

annuities as set forth above, that they were required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policy and/or annuity?

G. Whether MetLife negligently supervised its insurance agents?

20. The Representative Plaintiffs will assure the adequate representation of all members of the class, and have no conflict with the class members in the maintenance of this class action. The Representative Plaintiffs' claims are not only typical, but virtually identical to the claims of the class members. They have had no relationship with MetLife except as insureds and are aware that they cannot settle their actions without Court approval. Their interests in this action are antagonistic to the interests of MetLife and they will vigorously pursue the claims of the Class.

21. The Representative Plaintiffs have the financial resources to litigate this action. Moreover, Plaintiffs' undersigned counsel has agreed to assist in the payment of all reasonable and necessary costs to litigate this action.

22. Retained counsel, Behrend and Ernsberger, are

experienced in litigating class actions and have handled class actions in this Court for and on behalf of other Representative Plaintiffs. Counsel are handling this case on a contingent basis and will receive compensation for their professional services only as awarded by this Court.

23. A class action provides a fair and efficient method of adjudicating the controversy set forth in the class. The substantive claims of the Representative and Class Plaintiffs are virtually identical and will require evidentiary proof of the same kind and application of the same law. Since MetLife has treated all Class members in a similar and/or identical manner, equitable and declaratory relief is appropriate with respect to the Class.

24. Representative Plaintiffs believe and therefore aver that there are no unusual legal or factual issues which would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the class fund will be minimized. Individual actions, as a result of the doctrine of stare decisis, could substantially impair the rights of the purported Class

members and an inconsistent adjudication would require MetLife to treat similarly and/or identically treated Class members, differently.

25. Having met the requirement for certification as a class, Plaintiffs respectfully request that this class be certified.

## COUNT I

## CLASS CLAIMS FOR VIOLATION OF THE UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

26. Paragraphs 1 through 25 are hereby incorporated by reference as if set forth fully at length herein.

27. The Plaintiffs purchased the above described insurance policy and suffered an ascertainable loss of money as a result of the use or employment by the defendants of a method, act or practice declared unlawful under the Fair Trade, and Business Practices Act found at 73 P.S. sec. 201-1 et seq. In particular, but not limited to:

a. The Defendant, MetLife, through its agents, servants and/or employees, caused a likelihood of confusion or of

misunderstanding to the approval or certification of the goods or services, in that they knowingly, falsely and fraudulently did not inform the Plaintiffs that the insurance policies and/or annuities above described were not approved and/or certified by the Pennsylvania Insurance Commission and that MetLife was required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policies and/or annuities in the Commonwealth of Pennsylvania, (201-2 (4) (ii));

b. The Defendant through its agents, servants and/or employees, represented that the goods or services provided had approval, and characteristics that they did not have in that MetLife represented that they would deal with the Plaintiffs fairly, honestly and in good faith, when in fact they did not, in that they failed to inform the Plaintiffs that the insurance policies and/or annuities that they sold were not approved by the Pennsylvania Insurance Commission and that they were required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policy and/or annuity, (201-2 (4) (v));

c. The Defendant, MetLife, through its agents,

servants and/or employees, represented that the services that would be provided were of a particular standard, quality or grade, when in fact they were of another, in that the Defendant, through its agents, servants and/or employees, represented that they were licensed insurance professionals and therefore skilled in selling insurance, that MetLife would deal with the Plaintiffs as their insurance agent in a fiduciary capacity of honesty, diligence and fair dealing, when in fact MetLife through its agents, servants and/or employees did not, and therefore the services did not rise to the level required of an insurance company through its agents, servants and/or employees, as licensed insurance professionals, insurance agents and in the fiduciary/agency capacity of honesty, diligence and fair dealing, (201-2 (4) (vii));

d. The Defendant, MetLife, through its agents, servants and/or employees, engaged in fraudulent conduct which created a likelihood of confusion and misunderstanding with the Plaintiffs in that they knowingly, falsely and fraudulently did not inform the Plaintiffs that the insurance policies and/or annuities above described were not approved by the Pennsylvania Insurance

Commission and that MetLife was required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policies and/or annuities to the Plaintiffs, (201-2 (4) (xvii);

WHEREFORE, the Plaintiffs demand judgment against the Defendant, Metropolitan Life Insurance Company for compensatory damages pursuant to 73 P.S. sec. 209-2 and in an amount in excess of $25,000.00, statutory treble damages, plus interest, costs, attorneys fees and demand exemplary or punitive damages in addition to the compensatory damages, and any other such relief that the court deems necessary or proper.

## COUNT II

## CLAIMS OF COMMON LAW FRAUD - DECEIT BY CONCEALMENT AGAINST METLIFE

28. The averments of Paragraphs 1 through 27 are incorporated.

29. MetLife had a duty to refrain from selling the insurance policies and/or annuities above described, which were not

approved and/or certified by the Pennsylvania Insurance Commission, for which MetLife was required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policies and/or annuities in the Commonwealth of Pennsylvania.

30. MetLife concealed from the purchasers of the insurance policies and/or annuities that the policies contained language which was unapproved by the Pennsylvania Insurance Commission.

31. The MetLife Account Representatives' omission to advise that the polices were illegal was material in plaintiffs decision to purchase the policies and/or annuities from MetLife.

32. MetLife and/or its agents knew, or in reckless disregard for the truth, should have known, that the product being sold was unapproved by the Pennsylvania Insurance Commission and illegal.

33. Representative and Class Plaintiffs purchased insurance policies and/or annuities from MetLife in detrimental reliance upon the omission of the MetLife Account representatives

to advise that the policies and/or annuities contained language unapproved by the Pennsylvania Insurance Commission.

34. Representative and Class Plaintiffs were damaged by MetLife's schemes, as described above, because the omission to advise that the policies contained language unapproved by the Pennsylvania Insurance Commission, and the sale thereof, resulted in Plaintiffs' spending money on an illegal product, and thereby deprives Plaintiffs of their money that they wanted to deposit into an approved insurance policy and/or annuity.

## RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000, against MetLife, an award of interest, attorneys fees, costs and expenses and such other relief as this Court deems just and proper.

## SUB-CLASS ALLEGATIONS

35. This sub-class portion of the class action is brought

as a class action pursuant to Pa. R. Civ. Pro. Sect. 1702 on behalf of all Pennsylvania residents who purchased from Metropolitan Life Insurance Company ("MetLife") a "50/50 Savings Plan", a "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Advantaged Bonus Plan", an "Enricher Insured Savings Plan", and/or any retirement and/or savings plan, which each was purported to have life insurance "components", but which in reality were nothing more than life insurance policies. The purchase of the life insurance deprived the purchasers from the financial returns that could be received from a true investment vehicle, in comparison to the charges and commissions which are taken from the consumer to pay for a life insurance policy.

36. MetLife was offering one product (the retirement/ investment plans set forth in the paragraph above), and selling another (a life insurance policy). Selling life insurance policies as a retirement plan and not solely as life insurance is in MetLife's and its' agents economic interest, since the commissions earned and

the fees charged, would not otherwise come to MetLife, if it had been explained to the consumer and sold only as life insurance.

37. MetLife was on notice that the sale of life insurance as a retirement, investment, and/or savings plan and not as life insurance is improper, at the time that the Representative and Class Plaintiffs were sold their retirement/savings plans. (See exhibit 1.)

38. Robert Crimmins, the head of MetLife's Personal Insurance Unit, was aware by 1990 of the use of unauthorized nurses' retirement literature, and advocated "stern controls" for its cessation. (See exhibit 2.)

39. In January of 1990, Patrick Hunt, manager of MetLife Personal Insurance Contracts Bureau, was notified by the Texas state Board of Insurance that the sale of life insurance as a "Nurse's Retirement Savings Plan" was improper and misleading, and violated provisions in Texas law, similar to provisions in Pennsylvania law, which prohibit representing that life insurance is anything other than life insurance. (See exhibit 1.)

40. In January 1991, Roy Bertke, manager of Public

and Consumer Affairs at the MetLife South East Home Office in Tampa, Florida, wrote to Rick Urso, a Florida agent, and stated that a nursing retirement plan brochure "misleads people, [and is] a violation of insurance laws in every state". (See exhibit 3.)

41. By April of 1991, Harold J. Harrison, National Marketing Director of MetLife Resources, stated that he was aware that the nurses' retirement literature had been circulated in the past, and stated that it was improper because it did not disclose that it proposed the sale of life insurance. (See exhibit 4.)

42. Upon information and belief, Plaintiffs allege that MetLife knew, or should have known, in reckless disregard to the truth or falsity thereof, that MetLife Pennsylvania Account Representatives' marketing and sale of life insurance as a retirement, investment, and/or savings plan on the insured, was fraudulent and/or deceptive.

43. Plaintiffs allege that MetLife engaged in a statewide scheme, whereby MetLife intentionally sold policies of life insurance as a retirement and/or savings plan for the insured, with a life insurance component, to consumers that were interested

in purchasing a savings plan and/or a retirement plan, not life insurance. The customers did not get what they had bargained for. They lost money, when they thought they had "deposited" money into a retirement/savings plan for themselves.

44. The class is believed to include thousands of persons, and is, therefore, so numerous as to make it impracticable to bring all members of the respective sub-class before the Court. The exact number of sub-class members is unknown to Representative plaintiffs, but is believed to be ascertainable from records maintained by MetLife.

45. The advertising and marketing of this retirement/savings plan down played the mention of life insurance, even though the sale's objective was to sell life insurance. The advertising materials used promoted retirement or savings plans on the consumer with heavy emphasis on "savings" and "deposits" and that the plan had a life insurance component or death benefit. These marketing plans had the capacity to mislead consumers into purchasing life insurance under the false presumption they were purchasing a retirement and/or savings plan for themselves, that

also had a life insurance component.

46. MetLife's scheme injured the economic interests of the consumers that purchased the savings plan and/or retirement plan, at the same time that it promoted and enriched the economic interests of MetLife and its agents.

47. Common questions of law and fact affect the rights of each member of the sub-class and a common relief by way of damages for the Plaintiff sub-class is sought.

48. Among the predominating common questions of fact and law with reference to the Representative and Sub-Class Plaintiffs are:

A. Did they purchase the "50/50 Savings Plan", a "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plan on themselves, with a life insurance component, when in fact it was only a life insurance policy on themselves?

B. Whether MetLife knew that its agents were

selling whole life, life insurance as the "50/50 Savings Plan", a "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plan?

C. Whether MetLife knew with respect to the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plan, that it was not in their economic and/or financial interest to purchase the above plans for themselves?

D. Whether MetLife's sale of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a

retirement and/or savings plans as set forth in this complaint, violated Sections 201-2(4) (ii), (v), (vii), (ix) and (xiv) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. Sect. 201-2(4)?

E. Whether MetLife's sale of insurance as a "retirement", "investment", and/or "savings" plan, as set forth in this complaint, violated Sections 201-2(4) (ii), (v), (vii), (ix) and (xiv) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. Sect. 201-2(4)?

F. Whether MetLife and its agents that charged fees and commissions for the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plans breached their fiduciary duty to the purchasers, by not informing them that they were only purchasing life insurance and nothing more?

G. Whether MetLife and its agents were

engaged in a fraudulent sales scheme designed to deprive the purchasers of their money that they were willing to deposit into a savings and/or retirement plan for themselves?

H. Whether MetLife had knowledge of the scheme designed to deprive the purchasers of their money that they were willing to deposit into a savings and/or retirement plan for themselves?

I. Whether MetLife exercised good faith and fair dealing in the performance of its contractual obligations to the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and a retirement and/or savings plan?

J. Whether MetLife and its agents violated its fiduciary duty towards the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan",

"Enricher Insured Savings Plan", and a retirement and/or savings plan by not informing them directly that they had only been sold life insurance on themselves?

K. Whether MetLife was under a duty to inform the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and a retirement and/or savings plan, of the interest and dividend reductions?

L. Whether MetLife's sale of insurance as set forth in this complaint violated The Pennsylvania Bad Faith Insurance Statute 42 Pa.C.S.A. Sect. 8355?

M. Whether MetLife negligently supervised its insurance agents?

49. The Representative Plaintiffs will assure the adequate representation of all members of the sub-class, and have no conflict with the sub-class members in the maintenance of this class action. The Representative Plaintiffs' claims are not only

typical, but virtually identical to the claims of the sub-class members. They have had no relationship with MetLife except as insureds and are aware that he cannot settle their actions without Court approval. Their interests in this action are antagonistic to the interests of MetLife and they will vigorously pursue the claims of the sub-class.

50. A class action provides a fair and efficient method of adjudicating this controversy. The substantive claims of the Representative and Sub-Class Plaintiffs are virtually identical and will require evidentiary proof of the same kind and application of the same law. Since MetLife has treated all Class members in a similar and/or identical manner, equitable and declaratory relief is appropriate with respect to the Class.

51. The Representative Plaintiffs believe and therefore aver that there are no unusual legal or factual issues which would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the sub-class fund will be minimized. Individual actions, as a result of the doctrine of

stare decisis, could substantially impair the rights of the purported Sub-Class members and an inconsistent adjudication would require MetLife to treat similarly and/or identically treated Class members, differently.

52. The Plaintiffs seek damages, inter alia, pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. 201-9.2 for violations under section 201-2 (i - xiv) and the Pennsylvania Bad Faith Insurance Statute, 42 Pa.C.S.A. Sect. 8355, for selling a savings plan and or retirement plan, which in fact was only life insurance.

53. Having met the requirement for certification as a sub-class, Plaintiffs respectfully request that this sub-class be certified.

STATEMENT OF "50/50 SAVINGS PLAN"

REPRESENTATIVE PLAINTIFFS' CLAIMS

54. The Representative Plaintiffs received a phone call that they believe and therefore allege, followed the phone script

from the "50/50 Savings Plan" Track Book, which referenced only a Metropolitan savings program, when asking for an appointment. (See Exhibit 5.) (There is also a standard solicitation letter that was sent, see Exhibit 6.)

55. After setting up an appointment, MetLife Account Representatives came to the Plaintiffs' home and sold to the Plaintiffs a "50/50 Savings Plan", that was to be used either as a savings plan, or a retirement plan, which had an insurance component. The retirement/savings plan was "self completing", in that if you should die, before age 65, the death benefit would complete the "program" by paying the death benefit amount to your designated beneficiary.

56. The Account Executives used the Track Book, when they made the presentation of the "50/50 Savings Plan" to the Representative Plaintiffs, by reviewing the contents of the Track Book in the Plaintiffs' presence to aid the Account Executives in the sale with Plaintiffs.

57. The 50/50 Selling Points list (See Exhibit 7) from the 50/50 Plan Track Book failed to disclose that the solicitation

was intended to propose insurance, and emphasizing "savings" and "retirement income" while pointing out that the prospective client could not "rely on Social Security" or their "employer." (See Exhibit 8).

58. The "50/50 Savings Plan" Track Book contained standardized illustrations of the plan by sex and age, for monthly "deposits" of $100.00, showing cash value and monthly income generated at age 65.

59. The "50/50 Savings Plan" was designed to identify an amount of "savings" by the consumer and then apply that amount as equal premium payments into a Whole Life policy and a P.U.A.R. It is believed and therefore alleged that the MetLife agent force, deviated from the equal payments amounts and caused the entire amount to be paid into the Whole Life Policy, with the P.U.A.R. for optional payments. The effect of this deviation was to provide increased commission earnings for MetLife agents and sales managers.

60. A benefits illustration page from the Track Book entitled "Metropolitan 50/50 a plan to provide for your personal

savings" showed the plan as providing investment and savings aspects. (See Exhibit 9.)

61. The Coulters were sold the "50/50 Savings Plan" on or about January 12, 1993 and it was delivered to them on or about February 17, 1993, including a whole life policy number 935 000 470 A, in the face amount of $111,628.00.

62. The monthly "deposit" that was to be made into the Coulters' "50/50 Savings Plan", was $100.00 per month.

63. Shelley Daughenbaugh was sold the "50/50 Savings Plan" on or about January 8, 1993, and it was delivered to her on or about January 15, 1993, including a whole life policy number 934 901 403 A, in the face amount of $63,514.00.

64. The monthly deposit that was to be made into Ms. Daughenbaugh's "50/50 Savings Plan" was $50.00 per month.

65. The "50/50 Savings Plan" was presented to the Representative Plaintiffs in a blue three ringed binder that contained various papers which included: a comparison of the "50/50 savings plan" with an Individual Retirement Account (I.R.A.) and a Certificate of Deposit (C.D.), a mathematical

illustration of the investment vehicle, 50/50 Deposit slips, a copy of a newspaper article from December 17, 1990 USA TODAY which describes the quality of MetLife, in that: "... The quality of Met's investment portfolio is the best of any leading life company ...", and a whole life policy of insurance. (See Exhibits 10 through 16.)

66. The "50/50 Savings Plan" was nothing other than whole life insurance.

67. The Representative Plaintiffs, as part of the "50/50 Savings Plan" were also sold a "Paid Up Additions Insurance Rider", but not informed that if any money was "deposited" in the "P.U.A.R.", that a 5% commission would be deducted from the "deposit".

68. Representative Plaintiffs, and other MetLife "savings plan" and/or "retirement plan" purchasers, had a substantial property interest in the benefits of their "savings plan" and/or "retirement plan".

69. At a date now unknown, but believed to be in the spring of 1991, MetLife and its agents, to increase sales and

premium revenue, developed an insurance financing scheme to deprive Representative Plaintiffs and others of their hard earned money that they wanted to put into a "savings plan" and/or "retirement plan", by MetLife and its agents selling to Representative Plaintiffs and others the "50/50 Savings Plan" as a "savings plan" and/or "retirement plan", with a life insurance component, when it was in reality only a whole life insurance policy.

70. It is believed and therefore alleged that the "50/50 Savings Plan" and/or "Retirement Plan" was introduced to the Account Executives of MetLife by Gary Antonino and Mike George at a Regional meeting of MetLife in the Spring of 1991.

71. MetLife and its agents, along with Gary Antonino and Mike George, to implement this scheme, created a "Track Book" for the Account Executives (agents), so they could more easily sell the "50/50 Savings Plan" by following a prepared sale script. (A "Track Book" is a book that sets forth the sale program in a step-by-step fashion so that the sale agent can easily follow the procedure to sell the product.)

72. Along with the "Track Book", it is believed and therefore alleged that Gary Antonino and Mike George created the format of selling the scheme to Representative Plaintiffs and others in a blue three ringed binder, along with one or all of the following documents contained in the binder in plastic see-through folder pages: a comparison of the "50/50 Savings plan" with an Individual Retirement Account (I.R.A.) and a Certificate of Deposit (C.D.), a mathematical illustration of the investment vehicle, 50/50 Deposit slips, a copy of a newspaper article from December 17, 1990 USA TODAY which describes the quality of MetLife, in that "... The quality of Met's investment portfolio is the best of any leading life company ...", and the whole life policy itself.

73. In furtherance of the deceptive scheme, the presentation of the "50/50 Savings Plan" in the blue binder gave it an "air of authenticity", which was designed as a tool of persuasion to put the purchaser of the plan at ease.

74. The "50/50 Savings Plan" was introduced to the MetLife Account Executives (Agents) by Mike George who was, at all times relevant, the Regional Training Director. (He

subsequently became a Branch Manager in Washington, Pennsylvania and it is believed and alleged that he was directing the agents in the Washington, PA. office to sell the "50/50 Savings Plan and/or "Retirement Plan".)

75. It is believed and therefore alleged, the "50/50 Savings Plan" was endorsed by MetLife officers, Gary Antonino, who was, at all times relevant, the Regional Vice-President and Charles M. Kavitsky, Vice President, Mideastern Territory.

76. It is believed and therefore averred that the Track Book was sold to every MetLife sales agent in western Pennsylvania, as well as it was sold throughout the Commonwealth of Pennsylvania. (MetLife refers to their sales agents as "account representatives", amongst other titles they may obtain.)

77. It is believed and therefore averred that Mr. Antonino and Mr. George received a fee and/or commission on each Track Book that was sold.

78. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Plaintiffs, that the sale of whole life insurance as a "savings plan"

and/or "retirement plan", was in violation of Pennsylvania Insurance Laws, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and Bad Faith Insurance Statute, in that it is prohibited to sell life insurance as a "savings plan" and/or "retirement plan".

79. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Plaintiffs, that the sale of whole life insurance as a "savings plan" and/or "retirement plan", was not in the best financial interest of the Plaintiffs, in that the Plaintiffs would have been economically advantaged by investing their money in an actual savings plan as opposed to purchasing whole life insurance. In fact, if the Plaintiffs' money that was placed in the "50/50 Savings Plan" had been placed in a shoe box, after thirteen years time the plaintiff would have more money saved in the shoe box, than he would have saved in the "Guaranteed Cash Value" of the "50/50 Savings Plan".

80. MetLife, and/or it's licensed insurance agents, at all material times, was aware of this insurance scheme, to obtain

commissions through deceptive sales tactics. MetLife knew that the sale of whole life insurance as a "savings plan" and/or "retirement plan" was detrimental to the interests of the Plaintiffs that only wanted a savings plan and/or a retirement plan, not a life insurance policy.

81. Substantial commissions were paid to the Account Executives. It is believed and therefore averred that in the first year the commission earned by an Account Executive is 55% of the payment made by the Plaintiffs.

82. Neither a Certificate of Deposit, nor an Individual Retirement Account, have sales commissions, let alone a sales commission of 55% of the amount deposited, which was charged the Plaintiffs in the "50/50 Savings Plan".

83. The commissions that were charged in the "50/50 Savings Plan" directly depleted any "savings", that were "deposited" in the "savings plan". In fact the "Guaranteed Cash Value" at the end of one year was zero dollars and zero cents ($ 0.00). (See Exhibit 16, page 4 of the Insurance Policy.)

84. It is believed and therefore alleged that MetLife

concealed and continues to conceal that the "50/50 Savings Plan", "savings plan" and/or "retirement plan" is illegal and violates Pennsylvania law.

85. It is believed and therefore alleged that MetLife concealed the fact that the "50/50 Savings Plan", "savings plan" and/or "retirement plan" is not a true savings plan with a life insurance component, but that it is nothing more than a whole life, life insurance policy.

86. Representative and Class Plaintiffs have been damaged by MetLife's concealment of the consequences of the fact that unlike a true retirement/investment and/or savings plan, that if deposits are not continually made into the savings/retirement plan, the premiums for the whole life policy has the potential for the cash value to decrease to the point where there would not be any money left in the policy and the Plaintiff would receive a lapse notice, if they do not pay additional money to MetLife. A true retirement/investment and/or savings plan does not deplete the principal, and in fact increases in value over time.

87. MetLife also concealed from Representative

Plaintiffs and others that had purchased the "50/50 Savings Plan", at all relevant times, the consequences of its post-1991 dividend reductions and that as a result of these reductions the Plaintiffs could eventually lose all of the money that they had "deposited" into the "50/50 Savings Plan".

88. At all times material, MetLife was aware of the scheme to obtain premiums and commissions by selling the "50/50 Savings Plan, "Retirement Plan" and/or "Savings Plan", when in reality all that they were selling was whole life, life insurance.

89. MetLife knew or should have known and in reckless disregard to the Plaintiffs rights:

A. that MetLife agents were selling the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan", when in reality all that they were selling was whole life, life insurance; and

B. that the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan" was not in the financial interest of Coulter and the Sub-Class Plaintiffs in light of the fact that they wanted a retirement plan or a savings plan, which comes with little or no risk of losing the capital invested, as opposed to the whole

life insurance which could cause the capital "deposited" into the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan", to be depleted to nothing, because of the premium charges for the insurance coverage.

90. During all times material hereto, MetLife perpetrated this same fraudulent insurance sales scheme by selling the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan" to thousands of consumers in Pennsylvania, knowing or in reckless disregard to their rights that the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan", could deplete all of the money "deposited" in the same, as well as the fact that it violates Pennsylvania Law to sell life insurance as an investment such as a retirement plan or a savings plan.

91. MetLife concealed and continues to conceal that from the purchasers of the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan", that their investments are being depleted and that they could end up with nothing for all of the money that they thought that they were saving, by "depositing" their money into their "50/50 Savings Plan, "Retirement Plan" and/or "Savings

Plan".

92. Representative and Sub-Class Plaintiffs have been damaged by MetLife's concealment of the consequences of its dividend reductions, which in the future, in many if not all of the "50/50 Savings Plans", "Retirement Plans" and/or "Savings Plans", will cause the depletion of all of the money "deposited" into the same.

## STATEMENT OF OTHER RETIREMENT PLAN REPRESENTATIVE PLAINTIFFS' CLAIMS

93. Representative Plaintiffs were sold one or more of the following types of retirement and/or savings plans:

a.) Individual Retirement Benefit Plan;

b.) Nurse's Insured Retirement Plan;

c.) Nurse's Guaranteed Retirement Plan;

d.) Tax Favored Retirement Plan;

e.) State Street Wealth Accumulation Plan; and/or

f.) Enricher Insured Savings Plan.

94. Representative Plaintiffs were contacted by MetLife Account Representatives regarding an opportunity to purchase a retirement plan. The objective of this sales solicitation was to sell life insurance and earn a commission on the sale.

95. Although the product being sold was life insurance, in the sales presentation, the MetLife Account Representative emphasized the "savings" and "retirement income" aspects of the "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and the retirement and/or savings plan being sold.

96. As part of some plans, such as the State Street Wealth Accumulation Plan, Representative Plaintiffs were to make two equal "monthly investment" payments to MetLife: Part A to pay for an "insured savings", and Part B to pay for a money market investment. The Account Representative explained that Part A was a "type of IRA" that could be used for retirement. In reality, Part A was life insurance.

97. As part of the sales presentation, the Account Representatives showed Representative Plaintiffs several illustrations regarding the return on the money they would be "investing" until age 65. As a result of their investment, they would receive hundreds of thousands of dollars at age 65.

98. The literature which was used as part of the sales presentation to Representative Plaintiffs failed to disclose that the solicitation was intended to propose insurance, instead emphasizing "investment" and "retirement income".

99. The illustration and the sales presentation used by MetLife Account Representatives trumpeted MetLife's excellent financial ratings and investment portfolio. These materials also stated that the product being purchased was for use as a retirement plan, emphasizing the product's growth and tax benefits, as well as the unreliability of social security.

100. It is believed and therefore alleged that the sale of retirement, investment, and/or savings plans which in reality were nothing more than life insurance was endorsed by MetLife officers.

101. MetLife, and/or it's licensed Insurance agents, knew

or should have known, in reckless disregard of the rights of the Plaintiffs, that the sale of life insurance as a "savings plan", "investment plan", and/or "retirement plan", as described in this Complaint, was in violation of Pennsylvania Insurance Laws, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and Bad Faith Insurance Statute, in that it is prohibited to sell life insurance solely as a "savings plan", "investment plan", and/or "retirement plan".

102. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Plaintiffs, that the sale of life insurance as a "savings plan", "investment plan", and/or "retirement plan", was not in the best financial interest of the Plaintiffs, in that the Plaintiffs would have been economically advantaged by investing their money in an actual savings plan as opposed to purchasing life insurance.

103. MetLife, and/or it's licensed Insurance agents, at all material times, were aware of this insurance scheme, to obtain commissions through deceptive sales tactics. MetLife knew or should have known that the sale of life insurance as a "savings

plan", "investment plan", and/or "retirement plan" was detrimental to the interests of the Plaintiffs that only wanted a savings plan, investment plan and/or a retirement plan, not a life insurance policy.

104. Relying to their detriment on representations of MetLife Account Representatives as made to Representative Plaintiffs in their capacity as insurance professionals, Representative Plaintiffs purchased the "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and savings and/or retirement plans at times ranging from 1988 through 1993.

105. MetLife concealed and continues to conceal from the purchasers of the "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any other "savings", "investment", and/or "retirement" plans that their

"investments" are being depleted and that they could end up with nothing for all of the money that they thought that they were saving, by "depositing" their money into their retirement, investment, and/or savings plan.

106. Representative Plaintiffs have been damaged by MetLife's concealment of the consequences of its dividend reductions, which in the future, in many if not all of the "retirement", "investment", and/or "savings" plans, will cause the depletion of all of the money "deposited" into the same.

107. MetLife knew or should have known but for reckless disregard to the Plaintiffs' rights:

A. that MetLife agents were selling the "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any other "savings", "investment", and/or "retirement" plan, when in reality all that they were selling was life insurance; and

B. that the "State Street Wealth Accumulation Plan",

"Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any other "savings", "investment", and/or "retirement" plan were not in the financial interest of Representative Plaintiffs, in light of the fact that they wanted a retirement, investment, and/or savings plan for themselves, which comes with little or no risk of losing the capital invested, as opposed to life insurance which could cause the capital "deposited" into the "retirement", "investment" and/or "savings" plans to be depleted to zero, to pay for the insurance coverage.

## STATEMENT OF PLAINTIFFS' CLAIMS WHICH FALL OUTSIDE OF HORTON SETTLEMENT CLASS DEADLINE

108. Representative Plaintiff was contacted by MetLife Account Representatives regarding an opportunity to purchase a retirement plan. The objective of this sales solicitation was to sell life insurance and earn a commission on the sale.

109. Although the product being sold was life insurance,

in the sales presentation, the MetLife Account Representative emphasized the "savings" and "retirement income" aspects of the product being sold.

110. The Account Executives used the Track Book, when they made the presentation of the "retirement plan" to the Representative Plaintiff, by reviewing the contents of the Track Book in the Plaintiff's presence to aid the Account Executives in the sale with Plaintiff.

111. The sales solicitation failed to disclose that the solicitation was intended to propose insurance, and instead emphasized "savings" and "retirement income".

112. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Representative Plaintiff, that the sale of whole life insurance as a "savings plan" and/or "retirement plan", was in violation of Pennsylvania Insurance Laws, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and Bad Faith Insurance Statute, in that it is prohibited to sell life insurance as a "savings plan" and/or "retirement plan".

113. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Plaintiff, that the sale of whole life insurance as a "savings plan" and/or "retirement plan", was not in the best financial interest of the Plaintiff, in that the Plaintiff would have been economically advantaged by investing his money in an actual savings plan as opposed to purchasing whole life insurance. In fact, if the Plaintiff's money that was placed in the "retirement plan" had been placed in a shoe box, after thirteen years time the Plaintiff would have more money saved in the shoe box, than he would have saved in the "Guaranteed Cash Value" of his "retirement plan".

114. MetLife, and/or it's licensed insurance agents, at all material times, was aware of this insurance scheme, to obtain commissions through deceptive sales tactics. MetLife knew that the sale of life insurance as a "savings plan" and/or "retirement plan" was detrimental to the interests of the Plaintiff that only wanted a savings plan and/or a retirement plan, not a life insurance policy.

115. Substantial commissions were paid to the Account

Executives. It is believed and therefore averred that in the first year the commission earned by an Account Executive is 55% of the payment made by the Plaintiff.

116. Neither a Certificate of Deposit, nor an Individual Retirement Account, have sales commissions, let alone a sales commission of 55% of the amount deposited, which was charged the Plaintiff in the "retirement plan".

117. The commissions that were charged to the Representative Plaintiff's "retirement plan" directly depleted any "savings", that were "deposited" in the "retirement plan". In fact the "Guaranteed Cash Value" at the end of one year was zero dollars and zero cents.

118. It is believed and therefore alleged that MetLife concealed and continues to conceal that the "retirement plan", and/or "savings plan" is illegal and violates Pennsylvania law.

119. It is believed and therefore alleged that MetLife concealed the fact that the "retirement plan", "savings plan" and/or "retirement plan" which was sold to Representative Plaintiff is not a true savings plan with a life insurance component, but that it is

nothing more than a life insurance policy.

120. Representative Plaintiff has been damaged by MetLife's concealment of the consequences of the fact that unlike a true retirement/investment and/or savings plan, that if deposits are not continually made into the savings/retirement plan, the premiums paid for the life insurance policy has the potential for the cash value to decrease to the point where there would not be any money left in the policy and the Plaintiff would receive a lapse notice, if they do not pay additional money to MetLife. A true retirement/investment and/or savings plan does not deplete the principal, and in fact increases in value over time.

121. MetLife also concealed from Representative Plaintiffs and others that had purchased a "retirement plan", at all relevant times, the consequences of its post-1991 dividend reductions and that as a result of these reductions the Plaintiff could eventually lose all of the money that he had "deposited" into the "retirement plan".

122. At all times material, MetLife was aware of the scheme to obtain premiums and commissions by selling the

"retirement plan", and/or a "savings plan", when in reality all that they were selling was life insurance.

123. Mr. Recupero was sold the "retirement plan" on or about November 4, 1993 and it was delivered to him on or about December 8, 1993, including a whole life policy number 935 903 035 A, in the face amount of $27,835.00.

124. The monthly "deposit" that was to be made into Mr. Recupero's "retirement plan", was $30.00 per month.

125. MetLife, and/or it's licensed Insurance agents, at all material times, were aware of this insurance scheme, to obtain commissions through deceptive sales tactics. MetLife knew or should have known that the sale of life insurance as a "savings plan", "investment plan", and/or "retirement plan" was detrimental to the interests of the Plaintiffs that only wanted a savings plan, investment plan and/or a retirement plan, not a life insurance policy.

126. Relying to his detriment on representations of MetLife Account Representatives as made to Representative Plaintiff in their capacity as insurance professionals, Representative

Plaintiff purchased the "retirement plan".

127. MetLife concealed and continues to conceal from the purchasers of a "retirement", "savings", and/or "investment", plan that their "investments" are being depleted and that they could end up with nothing for all of the money that they thought that they were saving, by "depositing" their money into their retirement, investment, and/or savings plan.

128. Representative Plaintiff has been damaged by MetLife's concealment of the consequences of its dividend reductions, which in the future, in many if not all of the "retirement", "investment", and/or "savings" plans, will cause the depletion of all of the money "deposited" into the same.

129. MetLife knew or should have known but for reckless disregard to the Plaintiff's rights:

A. that MetLife agents were selling a "retirement", "savings", and/or "investment" plan, when in reality all that they were selling was life insurance; and

B. that the "retirement", "savings", and/or "investment" plan" plans were not in the financial interest of Representative

Plaintiff, in light of the fact that he wanted a retirement, investment, and/or savings plan for himself, which comes with little or no risk of losing the capital invested, as opposed to life insurance which could cause the capital "deposited" into the "retirement", "investment" and/or "savings" plans to be depleted to zero, to pay for the insurance coverage.

130. Representative Plaintiff's claims mirror that of the "50/50 Savings Plan" and other "retirement" and/or "savings" plans as set forth in this Complaint, and the same or similar types of fraud have been perpetrated upon Representative Plaintiff, who purchased a "retirement", "investment", and or "savings" plan which in reality was only life insurance.

131. Representative Plaintiff purchased a "retirement" and/or "savings" plan prior to January 1, 1990, the specified start date for the time frame (January 1, 1990 through October 31, 1993) chosen by MetLife for its nationwide notification to individuals who purchased a "retirement" plan which was in reality life insurance.

132. Accordingly, Representative Plaintiff was not

notified of his potential claim as were those who purchased a "retirement" plan between January 1, 1990 and October 31, 1993, who received notification of their potential claims from MetLife.

133. MetLife's exclusion of the class of plaintiffs who purchased fraudulently sold "retirement", "investment", and/or "savings" plans outside of the January 1, 1990 through October 31, 1993 time frame, is arbitrary and unfair.

## COUNT III

## CLAIMS FOR VIOLATION OF THE CONSUMER PROTECTION ACT

134. The averments of Paragraphs 1 through 133 are incorporated.

135. The conduct of MetLife and its agents described herein constitutes violations of Sections 201-2(4) (ii), (v), (vii), (ix) and (xiv) of the Pennsylvania Unfair Trade And Consumer Protection Law ("Consumer Protection Law"), and caused Plaintiffs to suffer an ascertainable loss of money as a result of the use or employment by the defendant of a method, act or practice declared

unlawful under the Consumer Protection Law, in particular, but not limited to:

a. The Defendant, MetLife, through its agents, servants and/or employees, caused a likelihood of confusion or of misunderstanding as to the approval or certification of the goods or services, in that they knowingly, falsely and fraudulently sold the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any retirement and/or savings plan which each was purported to have a life insurance "component", when in fact it was only life insurance, (201-2 (4) (ii));

b. The Defendant through its agents, servants and/or employees, represented that the goods or services provided had approval and characteristics that they did not have in that MetLife represented that they would deal with the Plaintiffs fairly, honestly and in good faith, when in fact they did not, in that they failed to inform the Plaintiffs that the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit

Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any "retirement", "investment", and/or "savings" plan which each was purported to have a life insurance "component", were in fact only life insurance, (201-2 (4) (v));

c. The Defendant, MetLife, through its agents, servants and/or employees, represented that the services that would be provided were of a particular standard, quality or grade, when in fact they were of another, in that the Defendant, through its agents, servants and/or employees, represented that they were licensed insurance professionals and therefore skilled in selling insurance, that MetLife would deal with the Plaintiffs as their insurance agent in a fiduciary capacity of honesty, diligence and fair dealing, when in fact MetLife through its agents, servants and/or employees did not, and therefore the services did not rise to the level required of an insurance company through its agents, servants and/or employees, as licensed insurance professionals, insurance agents and in the fiduciary/agency capacity of honesty, diligence and fair dealing, (201-2 (4) (vii));

d. The Defendant, MetLife, through its agents, servants and/or employees, engaged in fraudulent conduct which created a likelihood of confusion and misunderstanding with the Plaintiffs in that they knowingly, falsely and fraudulently did not inform the Plaintiffs that the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any retirement plan which each was purported to have a life insurance "component", was in fact only life insurance,

(201-2 (4) (xvii);

136. MetLife has violated the above quoted sections of the Consumer Protection Law by selling and charging for insurance in schemes that concealed from Plaintiffs that:

A. they were not purchasing a "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Retirement Plan", a "Tax Favored Retirement

Plan", "Enricher Insured Savings Plan", and/or any "retirement", "investment", and/or "savings" plan, but were only purchasing a life insurance policy; and/or

B. they were being charged a 55% commission and fees for a savings and/or retirement plan; and/or

C. they could lose the money that they "deposited" into the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any "retirement", "investment", and/or "savings" plan, by the depletion of the deposits through payment for the life insurance.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated, request that this Court declare that MetLife has violated the Consumer Protection Law and to award damages in the excess of $25,000, triple damages pursuant, and attorneys' fees, costs and expenses and any other relief this Court deems necessary and proper.

COUNT IV

CLAIMS FOR BREACH OF FIDUCIARY

DUTY BY METLIFE

137. The averments of Paragraphs 1 through 136 are incorporated.

138. MetLife and its licensed insurance agents, owes or owed fiduciary duties to the Representative and Class Plaintiffs who purchased the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a

"Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any retirement plan from MetLife.

139. MetLife and its licensed insurance agents held themselves out to the Representative and Class Plaintiffs as insurance professionals, with a high degree of skill and expertise in the insurance industry.

140. MetLife Account Representatives bolstered their credibility with insurance consumers by distributing business cards and letterhead with such professional qualifications as "Registered Representative" and "Financial Planner".

141. The qualifications advertised by the MetLife Account Representatives reasonably and justifiably caused the Representative and Class Plaintiffs to repose their trust in the recommendations and advice of the Account Representatives.

142. As a result of placing their trust in MetLife and/or its Account Representatives, the Representative and Class Plaintiffs were harmed, in that they lost money, when they intended to save money by placing it into a "retirement", "investment", and/or

"savings" plan with MetLife.

143. MetLife and its licensed insurance agents have breached its fiduciary duties to the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and/or any retirement plan from MetLife by selling and charging them for life insurance, when the purchasers thought that they were purchasing a retirement and/or a savings plan, that had an insurance component as an added incentive to the retirement and/or savings as alleged in this Complaint and by failing to timely advise them of the consequences of their dividend and interest reductions, which would deplete all of the "deposits".

144. The Representative and Class Plaintiffs have been damaged by MetLife's breach of its fiduciary duties and have lost or will lose in whole or part the money that they had invested into the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed

Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any retirement plan from MetLife, as well as the interest that they would have earned thereon.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000 against MetLife, an award of interest, attorneys fees, costs and expenses and such other relief as this Court deems just and proper.

COUNT V

CLAIMS FOR METLIFE'S BREACH OF
THE DUTY OF GOOD FAITH AND FAIR DEALING

145. The averments of Paragraphs 1 through 144 are incorporated.

146. Representative Plaintiffs entered into and fully performed all of their obligations under their "retirement",

"investment", and/or "savings" plan contracts with MetLife, by making "deposits" into the contracts.

147. By reason of the "retirement", "investment", and/or "savings" contracts, and in accordance with the provisions thereof, Representative Plaintiffs are entitled to all rights and benefits thereunder.

148. MetLife, through its agents, undertook the handling and processing of Representative Plaintiffs' "benefits" pursuant to their contracts.

149. At all times material, Representative Plaintiffs were not represented by counsel, and MetLife and/or its agents represented to and assured Representative Plaintiffs that they would receive "retirement", "investment", and or "savings" benefits pursuant to their contracts.

150. Representative Plaintiffs reasonably relied entirely on the advice of MetLife and/or its agents regarding the nature and extent of the benefits which were owed to them under their "retirement", "investment", and/or "savings" plan contracts. MetLife and/or its agents knew or should have known, in reckless

disregard for the rights of Representative Plaintiffs, that Plaintiffs reasonably relied upon their advice, and that they lacked independent representation.

151. At all times material and by reason of the MetLife "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plan, and life insurance policies purchased by the Representative and Class Plaintiffs, MetLife and/or its agents are charged with a duty of good faith and fair dealing regarding its determination of entitlement and payment of "retirement", "investment", and/or "savings" benefits under their contracts. This duty included, among others, the duty on the part of MetLife and/or its agents to pay or to advise Plaintiffs as to any and all benefits to which Plaintiffs are entitled pursuant to their contracts.

152. By virtue of the nature of the contracts, and in their capacity as insurance professionals, MetLife and/or its agents

occupied the position of a fiduciary regarding the determination of entitlement and payment "retirement", "investment", and/or "savings" benefits thereunder.

153. The conduct of MetLife and/or its agents in engaging in a scheme to deprive Representative and Class Plaintiffs of the benefits they would have received from a true or real investment of a saving and/or retirement plan (such as a Certificate of Deposit or an Individual Retirement Account) by selling and charging them for life insurance as alleged in this Complaint constituted a breach of its implied duty of good faith and fair dealing.

154. MetLife also breached a duty of good faith and fair dealing by failing to timely advise the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan of the consequences to them of its dividend and interest reductions, which causes the depletion of the monies "deposited".

155. The Representative and Class Plaintiffs have been damaged as a result of MetLife's breach and continuing breach of its implied contractual duty of good faith and fair dealing and have lost in whole the money that they "deposited" into the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated requests compensatory damages in excess of $25,000 against MetLife, an award of interest, costs and expenses and such other relief as this Court deems just and proper.

COUNT VI

CLAIMS OF COMMON LAW FRAUD - DECEIT BY CONCEALMENT AGAINST METLIFE

156. The averments of Paragraphs 1 through 155 are

incorporated.

157. MetLife had a duty to refrain from selling the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan, when in reality all that was sold was life insurance, and from charging Plaintiffs for the insurance in the manner alleged in this Complaint, since said selling schemes deprives Plaintiffs of their money that they wanted to deposit into a savings and/or retirement plan.

158. MetLife concealed from the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan:

A. That they were being only being sold and charged for life insurance;

B. That it was not in their economic interest to purchase and pay for the life insurance as a savings, investment, and/or retirement plan; and/or

C. The consequences of its dividend/interest reductions on their existing payments insofar as maintaining their savings and/or retirement plan.

159. The MetLife Account Representatives' omission of the actual nature of the product being old was material in plaintiffs decision to purchase a "retirement", "investment", and/or "savings" plan from MetLife.

160. MetLife and/or its agents knew, or in reckless disregard for the truth, should have known, that the product being sold was only life insurance.

161. Representative and Class Plaintiffs purchased a "retirement", "investment", and/or "savings" plan from MetLife in detrimental reliance upon the representations of the MetLife Account representatives.

162. Representative and Class Plaintiffs were damaged by MetLife's schemes, as described above, because the selling scheme deprives Plaintiffs of their money that they wanted to deposit into a savings and/or retirement plan.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000, against MetLife, an award of interest, attorneys fees, costs and expenses and such other relief as this Court deems just and proper.

COUNT VII

CLAIMS FOR NEGLIGENT SUPERVISION

163. The averments of Paragraphs 1 through 162 are incorporated.

164. The sale of life insurance as described in this Complaint is within the scope of the MetLife Account Representatives' employment.

165. MetLife Account Representatives purported to act and/or speak on behalf of MetLife when they sold the "retirement", "investment", and/or "savings" plans as described in this Complaint.

166. MetLife had a duty to adequately supervise its insurance agents by protecting the purchasers of their product from unscrupulous conduct and/or improper sales tactics.

167. MetLife had a duty to institute appropriate safeguards so that the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan, were informed by the sale agents (account representatives), that they were only being sold life insurance instead of a savings and/or retirement plan.

168. MetLife knowingly, recklessly and/or negligently failed and/or refused to adequately supervise its insurance agents in the sale of the "retirement", "investment", and/or "savings" plans, to the Representative Plaintiffs and the Class, and instructed,

encouraged or otherwise knowingly allowed its agents to carry out the insurance schemes alleged in this Complaint.

169. MetLife and its agents and managers ratified the actions of MetLife Account Representatives by failing to adequately control or supervise them in their sale of insurance.

170. MetLife is liable for the actions of its Account Representatives, as set forth in this Complaint, in that MetLife knew or should have known that these improper sales tactics were taking place.

171. MetLife's knowing, reckless or negligent supervision of its agents and employees resulted in substantial financial harm to Representative Plaintiffs and the Class.

172. MetLife carried out this scheme willfully, wantonly and with reckless disregard for the rights and interests of the Representative and Class Plaintiffs causing them to lose in whole or part their hard earned money which was "deposited" into the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher

Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000, against MetLife, an award of interest, attorneys fees, costs and expenses and such other relief as this Court deems just and proper.

COUNT VIII

BREACH OF CONTRACT

173. The averments of Paragraphs 1 through 172 are incorporated.

174. MetLife and its agents and/or employees offered to provide Representative and Class Plaintiffs with retirement, investment, and/or savings plans, as set forth in this Complaint.

175. Representative and Class Plaintiffs accepted MetLife's offer to purchase a "retirement", "investment", and/or "savings" contract.

176. Representative and Class Plaintiffs purchased the product being offered for sale by MetLife Account Representatives because they believed that they would be saving and/or investing money for their retirement, as based upon the representations and illustrations offered by MetLife Account Representatives.

177. As consideration for their retirement, investment, and/or savings plan contracts, Representative and Class Plaintiffs made initial and monthly "deposits" into their contracts.

178. In reality, MetLife and or its agents and/or employees were selling only life insurance.

179. MetLife fraudulently concealed the fact that all that was being sold to Representative and Class plaintiffs was life insurance, not a retirement, investment, and or savings plan.

180. Had Representative and Class Plaintiffs been aware that all that was being sold was life insurance, they would not have entered a "retirement", "investment" and/or "savings" contract with MetLife.

181. Representative and Class Plaintiffs are entitled to the full complement of benefits which were promised to them

pursuant to the "retirement", "investment", and/or "savings" contracts which they entered with MetLife, on the basis of the illustrations and representations of MetLife's Account Representatives.

182. Representative and Class Plaintiffs seek damages based upon the contracts which they entered with MetLife, in addition to any and all other relief that may be available to them.

RELIEF

Wherefore, Representative and Class Plaintiffs, on behalf of themselves and all others similarly situated request that they receive the full complement of benefits which they were offered pursuant to the retirement, investment, and/or savings plan contracts entered with MetLife.

COUNT IX

BAD FAITH BREACH OF CONTRACT AGAINST METLIFE

183. The averments of Paragraphs 1 through 182 are

incorporated.

184. The Defendant MetLife, through its agents, servants and/or employees, who are licensed insurance professionals, sold "50/50 Savings Plans", a "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan to Pennsylvania citizens, including Representative Plaintiffs, under the guise of selling a retirement and/or savings plan with a life insurance component.

185. It is believed and therefore alleged that MetLife and its agents knew or should have known, in reckless disregard of the rights of the sub-class Plaintiffs, that it was misleading, confusing, deceptive and fraudulent, to sell a retirement and/or savings plan with a life insurance component, when in fact it was only a life insurance policy and nothing more.

186. MetLife through its agents, servants, and/or employees, had the Representative Plaintiffs sign an application form, (which was prepared and filled in by the account executive)

and had them pay an initial "deposit" to initiate the retirement and/or savings plans.

187. MetLife through its agents, servants, and/or employees, subsequently delivered to the sub-class Plaintiffs the retirement/savings program, which also contained a whole life insurance policy. The documents that were delivered, with the whole life policy, comprised the retirement/savings plan contracts. (See e.g., exhibits attached to the Complaint for copies of the documents that comprised the "50/50 Savings Plan".)

188. The said retirement/savings plan contracts were entered into by the Representative Plaintiffs by the signing of the application form in good faith and was an acceptance by the Plaintiff of the retirement/savings plans, as explained by the Account Executive and confirmed in writing by the documents given to the Representative Plaintiffs, as described above.

189. While entering into the retirement/savings plan contracts and collecting payments thereon, MetLife fraudulently, willfully, wantonly and in bad faith, failed to inform the Representative Plaintiffs that all that they were purchasing was a

life insurance policy, not a retirement/savings plan.

190. MetLife falsely and fraudulently misled the Representative Plaintiffs into believing that they were depositing money into a retirement/savings plan, when in fact it was only a life insurance policy.

191. The Representative Plaintiffs, as a result of the misrepresentations of MetLife, and its agents, not knowing the truth or falsity regarding them, but believing them to be true, relied upon the misrepresentations to their detriment.

192. MetLife fraudulently, recklessly, wilfully and wantonly and in bad faith breached the terms of the retirement/savings plan, and in fact is not honoring the terms and conditions of the retirement and/or savings programs.

193. Representative Plaintiffs seek relief from MetLife's bad faith acts under the Pennsylvania statute 42 Pa. C.S. Section 8371, in addition to any and all other relief that may be available to them.

**RELIEF**

Wherefore, Representative Plaintiffs, on behalf of

themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000, against MetLife, an award of interest from the date that the claim was made in the amount equal to the prime rate plus 3%, attorneys fees, costs and expenses and such other relief as this Court deems necessary, just and proper.

JURY DEMAND

Representative Plaintiffs, individually and on behalf of the class they represent, request a trial by jury on all counts of this Complaint.

Respectfully Submitted,
BEHREND AND ERNSBERGER

By /s/

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2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

DATED: AUGUST 16, 1994

CERTIFICATE OF SERVICE

I, Kenneth R. Behrend, hereby certify that a true and correct copy of the within Amended Class Action Complaint was served this 16th day of August, 1994 upon the following by United States mail, first class, postage prepaid, addressed as follows:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
CIVIL ACTION NO. 93-1849-CIV-T-23A

SHERRY HORTON
1732 Cone Street
Toledo, OH 43606

JOYCE ARMBRUSTER
Oakwood Drive
Largo, FL 34640

PLAINTIFFS

vs.

METROPOLITAN LIFE INSURANCE COMPANY
DEFENDANTS
SERVE:
STUART NAGLER
An Officer and managing Agent
One Madison Avenue
New York, NY 10010

RICK URSO
2826 Morrison Avenue
Tampa, FL 33609

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INTERVENOR'S (PENNSYLVANIA COULTER CLASS) MOTION FOR INTERVENTION

Pursuant to Fed.R.Civ.P. 24, Ronald and Anissa Coulter, representatives of the class of Pennsylvania residents (Intervenors) similarly injured by the Metropolitan Life Insurance Company's (hereinafter MetLife) insurance practices,

respectfully requests that all Pennsylvania residents be severed and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action against the Metropolitan Life Insurance Company. if the Court does not permit severance, in the alternative, the aforesaid Pennsylvania residents encompassed by the Horton Class action request that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law.

1. Ronald and Anissa Coulter are Pennsylvania residents who purchased a "50/50 Savings Plan" in Pennsylvania from a MetLife agent based in Butler, Pennsylvania. The 50/50 Savings Plan" was allegedly a retirement plan with a life insurance component. In reality, it was whole life, life insurance.

2. The "50/50 Savings Plan", as it was presented and sold to consumers in Pennsylvania, was never presented to the Pennsylvania insurance Department, and accordingly was not approved by the Pennsylvania Insurance Department.

3. The "50/50 Savings Plan" did not contain disclosure language to the effect that the plan, because it was comprised

only of whole life insurance, was not an investment or savings plan.

4. Disclosure language stating that life insurance is not an investment or savings plan is required by the Pennsylvania Insurance Department. 40 Pennsylvania Statute section 277; 40 Pennsylvania Statute section 472.

5. The Pennsylvania Insurance Department specifically undertook an investigation of MetLife's sales practices in Pennsylvania and issued a lengthy and detailed report of its findings. See Report of Market Conduct Examination of the Metropolitan Life Insurance Company, December 23, 1993, at pp. 3839; 58; 71-72; 96-97; 155-160 (exhibit 1). The Insurance Department's effort in this regard is unequivocal evidence of its concern that Pennsylvania residents be protected from the fraudulent insurance practices detailed in the Report.[3]

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[3] The Coulters respectfully request that this Court take judicial notice of the Pennsylvania Insurance Department's Report and will provide a copy of the Report in its entirety if the Court so desires.

6. The Coulters, as representatives of all those persons similarly injured in Pennsylvania, brought a class action suit in state court, pursuant to statutory and common law of Pennsylvania (see Amended Coulter Complaint, exhibit 2), on behalf of Pennsylvania citizens injured by MetLife's failure to have the life insurance Policies Properly approved by the Pennsylvania Insurance Department Prior to selling the same, as well as MetLife's failure to effectuate disclosure as is required by the Pennsylvania Insurance Department and other fraudulent insurance practices. (See exhibit 1, at pp. 155-160.)

7. The Pennsylvania Consumer Protection Law allows for a private cause of action against insurance companies and sets forth that it is a violation to sell or represent that a good or service has approval which it does not have.

8. The Coulter Class, complaint also includes a sub-class of Pennsylvania residents who purchased MetLife life insurance which MetLife agents represent ad to be a retirement or savings plan with a life insurance component, which is also an alleged

violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law("CPL"). 73 Pennsylvania Statute 201-2, as well as the Pennsylvania Unfair Insurance Practices Act, 40 Pennsylvania Statute section 277, and is a violation of the Pennsylvania Bad Faith Insurance Statute, 42 Pennsylvania Code Statutes Annotated section 8371.

9. Ronald and Anissa Coulter also filed a Class Action Complaint in the Court of Common Pleas of Allegheny County, on May 18, 1994, against individual defendants Michael George, former MetLife Training Director, and Gary Antonino, former MetLife Regional Vice-President, who formulated the "50/50 Savings Plan" scheme in Pennsylvania. The Class in that case is comprised of Pennsylvania residents who purchased MetLife life insurance, which, at the direction of Michael George and Gary Antonino, was represented by MetLife agents to be a retirement or savings plan with a life insurance component. This misrepresentation is an alleged violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pennsylvania Statute section 201-2; the Pennsylvania Bad Faith

Insurance Statute, 42 Pennsylvania Code Statutes Annotated section 8371; and the Pennsylvania Insurance Department Act, 40 Pennsylvania Statutes section 277. The claims in class action against Michael George and Gary Antonino are based upon the identical transactions and occurrences as in the earlier filed class action.

10. The Coulter Class and sub-class members, all of whom executed contracts of insurance in Pennsylvania and were injured in Pennsylvania, are entitled to the application of Pennsylvania law to their causes of action. Any practice to the contrary is a denial of due process to the Coulter class and sub-class. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In Phillips Petroleum, the United States Supreme Court declared that the application of Kansas law in a class action to claims which did not arise in Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits". Id. at 822.

11. Representative Coulter is a steel worker. The remainder of the class is constituted of those who purchased retirement plans with a life insurance component from MetLife and is not

limited to any particular profession or occupation.

12. In contrast, the Horton class action represents "primarily . . . licensed nurses . . . [and other health care professionals]" (Horton Class Action Complaint, 4/22/94, at pph. 19), who purchased MetLife life insurance which they each believed to a retirement or savings plan as a result of MetLife's agents' representations. (Horton Class Action Complaint at pph. 8.)

13. The Coulter class and sub-class seek relief on the basis of the Pennsylvania CPL, 73 Pennsylvania Statute section 201-1 et seq., the Pennsylvania Bad Faith Insurance Law, 42 Pennsylvania Code Statutes Annotated section 8371, and Pennsylvania fraud and contract law.

14. The Pennsylvania CPL empowers the Pennsylvania Attorney General to adopt such rules and regulations as may be necessary to protect Pennsylvania residents from fraud and unfair or deceptive business practices. A Pennsylvania purchaser of goods, such as each member of the Coulter class, also has a private right of action under the Pennsylvania CPL.

15. The Coulter Class and sub-class, by virtue of their

claims for relief pursuant to the Pennsylvania CPL and Bad Faith Insurance statute, have claims atypical of those of the Horton class as well as the class of any other state.

16. The Coulter Class became aware of the pending Horton class action and settlement agreement, and the Horton Class' attempt to encompass the Coulter Class when several Coulter Class members received opt-out notices on or about May 5, 1994.

17. The settlement reached between the Horton Class and MetLife is the product of the claims and defenses available under Florida law and does not adequately protect or serve the rights, interests and/or defenses of contracting parties in Pennsylvania, specifically, the Coulter Class.

18. For example, the Pennsylvania Insurance Department has already ordered the relief which was ordered in the Horton Class settlement, i.e., restitution of premiums paid as a result of MetLife's fraudulent business practices. See Order of Deputy Insurance Commissioner for Pennsylvania Insurance Department,, 2/11/94, (exhibit 3). Enforcing the settlement

agreement with regard to the Coulter Class is a clear abridgement of the class, rights to seek additional damages which are available under Pennsylvania law.

19. Accordingly, the proposed Horton Class Settlement agreement does not adequately protect the Coulter Class' rights and is therefore not in the best interests of the Coulter Class.

20. The Coulter Class has a right to intervene pursuant to Fed.R.Civ.P. 24 (a) (2), on the grounds that the Horton Class settlement may impair the Coulter Class from obtaining the relief to which it is entitled under Pennsylvania statutory and common law. The Coulter Class requests permissive intervention, pursuant to Fed.R.Civ.P. 24 (b) (2), because the Coulter Class' claims share a common question of law or fact with those advanced by the Horton Class; specifically, the fraudulent sales practices of MetLife.

21. The Horton Class action is founded upon Federal and Florida state RICO, breach of fiduciary duty and common law fraud Claims.

22. The allegations contained in the Horton Complaint and

Amended Complaint are dissimilar from the Coulter Class' claims against MetLife. The Horton Complaints purport to contain allegations common to all class members. However, they do not represent and/or contradict the Coulter Class, claims because:

1. the Horton class claims that the MetLife agents in Florida identified themselves to class members "nurse's representatives", Horton Complaint para. 4 (a); whereas Representative Coulter is a steel worker, and never, in the process of purchasing MetLife insurance, did he speak with anyone claiming to be a "steel workers representative"; in addition, the Coulter Class is not limited to any one profession or group;

2. that MetLife agents never referred to life insurance as such, but called it an "investment", Id. at para. 4(d); and that MetLife agents never disclosed that the product being purchased was life insurance, Id. at para. 8; in contrast, MetLife Account Representatives in Pennsylvania stated that the "50/50 plan" had a life insurance "component";

3. that MetLife agents perpetrated interstate wire and mail

fraud on the class; Id. at para. 23 (a) and (b); and that Florida RICO applies to the claims of the class, Id. at pares. 28-35; where the Coulter Class, claims are limited to events which occurred in Pennsylvania;

4. that a Florida agent's (Urso's) actions are common to all class members, Id. at para. 40; where the Coulter Class' claims are based on the representations and/or omissions made only by Pennsylvania Account Representatives and officers;

5. erroneously alleges federal RICO in connection with the class, insurance claims, contradictory to the McCarran-Ferguson Act which dictates that states should regulate their respective insurance industries and that federal causes of action are not applicable, Id. at paras. 20-27; but the Coulter Class has not alleged MetLife RICO violations in connection with its claims.

23. The requirement of Fed.R.Civ.P. 23 (a) (2) that there be "questions of law or fact common to the class" is not satisfied by the Horton Class representative.

24. The requirement of Fed.R.Civ.P. 23 (a) (3) that "the claims or defenses of the representative parties are typical of the

claims or defenses of the class" is not satisfied by the Horton Class representative.

25. The requirement of Fed.R.Civ.P. 23 (a) (4) that "the representative parties will fairly and adequately protect the interests of the class" is not satisfied by the Horton Class representative because the remedies available under Pennsylvania statutes and common law are not available to the Horton Class representative.

WHEREFORE, the plaintiffs respectfully request that all Pennsylvania residents be severed and allowed to proceed, with the Coulters as Class representatives, in Pennsylvania, as a separate class action against the Metropolitan Life Insurance Company. If the Court does not permit severance, in the alternative the aforesaid Pennsylvania residents encompassed by the Horton Class action request that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law.

Respectfully submitted,

/S/
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CERTIFICATE OF SERVICE

I, Kenneth R. Behrend, hereby certify that a true and correct copy of the within Brief in Support of Plaintiffs, Motion for intervention was served this 20th day of May, 1994, upon the following by United States mail, first class postage prepaid addressed as follows:

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EXHIBIT 1

Excessive FIP ratios were noted for MetLife offices not identified by audit reports.

FINDINGS AND CONCLUSIONS

From analysis of MetLife consumer complaints, audit reports and FIP reports, it was clear management failed to utilize or integrate available internal control mechanisms to detect and control improper replacement activity.

-The impact of improper replacement activity upon complaint data, i.e. increased complaints, would not be expected to occur until such time as new policies failed to perform as solicited. Thus current complaints would not be expected to accurately mirror improper replacement activity as indicated by FIP ratios contemporary to complaints.

-MetLife complaint ratios, due to Replacement and Misrepresentation, of 75.98%, 81.03% and 72.80% in years 1990, 1991 and 1992 (see page 13) should have been cause for MetLife management to have examined those issues and to have scrutinized current audit and FIP reports.

-Access of MetLife corporate management to those reporting

vehicles indicates corporate managements awareness of replacement and misrepresentation as practices existing within the marketing strategy.

-other than audit reports, no MetLife corporate directives specifically identified replacement and misrepresentation issues requiring correction, within Pennsylvania.

-A December 16, 1992 letter by Richard N. Maurer, senior Vice President, Career Agency Operations of MetLife, directed to the MetLife field force, entitled "Honesty and Integrity: our Basis For Doing Business", reiterated MetLife's position requiring honest and ethical business conduct, indicating an awareness and concern of corporate MetLife as to practices of the field force.

-Sales representatives informed customers that existing policies were to be left in place until policy anniversary, and not immediately surrendered, in order to earn dividends.

-Insureds were instructed to disregard MetLife annual premium or lapse notices, which were explained by MetLife sales representatives as computer errors.

-MetLife checks for values taken from existing policies were routed through consumer homes in attempts to conceal replacement activity in conjunction with the sale of a new policy.

-Policies were not countersigned or dated at delivery in three (3) of the six (6) cited cases. Where delivered policies had been countersigned and dated at delivery, two (2) of the three (3) cases showed untimely delivery.

-FINDINGS AND CONCLUSIONS-

The observed pattern of deceptive solicitations and concealed replacements by MetLife sales representatives appears to have been for the purpose of increasing their commissions. Replacement solicitations were such as to cause policyholders, directly or indirectly, to believe that by using their existing policy values to purchase new insurance they were to receive paid-up policies, free coverage, or increased coverage at little or no additional cost.

Supporting the cover letter which accompanied the delivered policy were two (2) pages, one captioned "Individual Retirement

Benefit (I.R.B.) v.s. Individual Retirement Account (I.R.A.) Certificate of Deposit (C.D.)" and the other captioned "Metropolitan Investment Program". The captioned pages represented the Life to 95 policy as an "investment" and a "savings" program. It was falsely stated there was no "penalty for early withdrawal" and that the I.R.B. provided a 119 to 12-t Long Term Rate of Return". MetLife subsequently informed the Insurance Department that based upon the current values, as of December 1992, the policy would require additional premium payments for eight (8) years in order to reach a point where it would become self-supporting.

FINDINGS AND CONCLUSIONS

The Unfair Insurance Practices Act, No. 205, Section 5(a)(1)(vi) defines "Unfair Methods of Competition" and "Unfair or Deceptive Acts or Practices" as 11... Making, publishing, issuing or circulating any estimate, illustration, circular, statement, sales presentation, omission comparison which:" ... Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion or surrender of

any insurance policy".

Section 637 of The Insurance Department Act prohibits misrepresentation of terms of policy and future dividends by agents, brokers, or solicitors. "No agent or solicitor of any insurance company, association, or exchange, and no insurance broker, shall issue, circulate, or use, or cause or permit to be issued, circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such company, association, or exchange, or make an estimate, with intent to deceive, of the future dividends payable under such policy.,,

The referenced examples clearly demonstrate the noted pattern of sales practices and procedures used by MetLife sales representatives in utilizing sales illustrations based upon non-guaranteed projected values, and in many cases reinforcing the sales illustration values with cover letters containing misleading statements concerning the insurance policy being sold.

approval, and that only the Tax Advantaged Bonus Plan for Nurses had penetrated into the Pennsylvania marketplace.

MetLife had allegedly recalled and destroyed all unapproved issues of the advertising. The MetLife corporate advertising was found consistent with other questioned advertising, in that it promoted the sale of whole life policies of insurance through solicitations promising earnings for retirement. While containing footnoted disclosure information, the various advertising pieces possessed a capacity, through stating precise earning values, to deceive consumers as to future earnings. Further, sales solicitation scripts employed by telemarketers clearly avoided the presentation of the Tax Advantaged Bonus Plan as insurance. The Tax Advantaged Bonus Plan was found to have evolved from 1991 to 1993 through the backing of MetLife Senior Vice President Richard N. Maurer and was, in fact, termed alternatively "The Maurer Plan". Charles M. Kavitsky, Territorial officer In Charge and Vice President, Mideastern Territory, was found to have coordinated and provided telemarketing support to MetLife sales representatives J. Joel Sherman, Richard Antonino, and Ronald Schram in Western Pennsylvania for the Tax Advantaged Bonus Plan.

-FINDINGS AND CONCLUSIONS-

Although the examination could not identify in detail the full extent of market penetration gained by MetLife through use of the various retirement/savings/investment plan solicitations, testimony of consumers and MetLife agents contacted during the examination indicated the misleading solicitation methods were used routinely to solicit Whole Life, Life to 95, and Life to 98 policies sold by MetLife. It is clear the various forms of advertising developed and used by MetLife sales representatives were designed to preclude proper disclosure of insurance sales to Pennsylvania consumers. It was also noted, while the focus of the examination was an a six (6) county Western Pennsylvania Region, the various marketing schemes and practices occurred throughout Pennsylvania.

## X. FORMS FILING AND APPROVAL

Throughout the course of the examination, it was noted MetLife policies viewed in consumer homes, policy copies sent into the Department in response to mail surveys, and specimen policies provided by MetLife's Johnstown office differed from

the corresponding MetLife policy forms which were approved by, and on file with, the Department.

Whole Life Policy (7-87) and Life to 95 (57-87): Form approval was granted by the Department for both policy forms on June 2, 1987. Departmental approval was granted to MetLife for replacement of policy pages seven (7) and eight (8) for both forms on June 12, 1991. The approved replacement pages provided consumers notice that; "You may ask us to pay premiums with a combination of yearly dividends, the cash value to any paid-up additions and/or any dividend accumulations. As long as these values are great enough, out-of-pocket premiums need not be paid to keep your policy in force." All policy forms 57-87 and 7-87 encountered during the examination, issued subsequent to June 12, 1991, contained the earlier pages which had been replaced with the pages approved June 12, 1991.

Upon subsequent review by MetLife, it was reported to the Department a total of seventy thousand five hundred fifty-seven (70,557) incorrect Whole Life Policy (7-87) forms and ten thousand three hundred eighty-one (10,381 Life to 95

(57-87) policy forms had been issued to Pennsylvania consumers. As a result, these two (2) unapproved policy versions were issued to a total of eighty thousand nine hundred thirty-eight (80,938) consumers subsequent to June 12, 1991.

Survivorship Whole Life Policy (2J-90 PA):

Form approval was granted by the Department for this policy form on October 23, 1990. MetLife had initially submitted a generic policy form 2J-90 which was disapproved by the Department. Resubmission was made in the form of 2J-90 PA, which included revisions to pages one (1) and nine (9), from what was originally filed under form 2J-90, concerning Supplemental Insurance Benefit and Split Policy Option. Based upon the revisions, policy form 2J-90 PA was then approved. However, all Survivorship Whole Life policies (2J-90 PA) noted during the examination contained the original page one (1) contained in policy 2J-90 which was not approved for use in Pennsylvania.

Upon subsequent review by MetLife, it was reported to the Department a total of three hundred eighty-three (383)

unapproved versions of Survivorship Whole Life policy 2J-90 PA, containing the unapproved language on page one (1), had been issued to Pennsylvania consumers subsequent to October 23, 1990.

Flexible Premium Life Insurance Policy (7UL-90): Form approval was granted by the Department for this policy form on August 23, 1990. The initial MetLife submission was disapproved. Among the points of disapproval was the use of disclosure language on the Policy Specification page stating "The Planned Premium shown below may need to be increased to keep this policy and coverage in force." The Department required additional disclosure language "Even if coverage continues, the amount payable on the final date of policy nay have little or no value.", be added to the disclosure language submitted on the Specification Page in order to be considered for approval. MetLife subsequently submitted an amended Policy Specification page with the requested disclosure language, and Departmental approval was granted August 23, 1990.

All Flexible Premium Life Policies (7UL-90) noted during the

examination contained the limited, unapproved, disclosure language on the Policy Specification page and lacked the disclosure language required to obtain approval of the policy. This is of serious concern to the Department since it was noted throughout the examination the Flexible Premium Life Policy (9UL-90) was the primary policy sold using the "free insurance" and "paid-up insurance" solicitations. The absence of the required disclosure notice to policyholders, denied consumers full and fair disclosure concerning future premium payments and policy value. The lack of proper disclosure was found to be particularly serious in terms of damage to consumers in view of the manner in which the policies were solicited and sold.

Upon subsequent review by MetLife, it was reported to the Department a total of twenty nine thousand eight hundred forty-two (29,842) Flexible Premium Life Policies (7UL-90) were issued to Pennsylvania consumers with unapproved and incomplete disclosure language.

Multifunded Flexible Premium Life Policy (7.6FM-90): Both unisex and sex distinct versions of this policy were granted

Departmental approval on November 6, 1990. It was noted throughout the examination policy form 7.6FM-90, as actually issued to consumers, contained additional unapproved policy language on pages 1, 3, 3.1, and 5.

Upon subsequent review by MetLife, it was reported to the Department a total of six thousand five hundred forty-two (6,542) unapproved versions of the Multifunded Flexible Premium Life Policy (76.FM-90) were issued to Pennsylvania consumers subsequent to November 6, 1990.

Throughout the course of the examination, all policy forms noted in consumer homes, as well as duplicate policies provided by MetLife, at the Department's request, contained non-guaranteed illustrated value tables bound in with the policy pages. Since only guaranteed value tables are permitted to be included in a bound policy, each policy containing the non-guaranteed illustrated value tables constitutes an unapproved version of the policy.

Upon subsequent review by MetLife, it was reported to the Department a total of three hundred eighteen thousand eight

hundred forty-two (318,842) policies were issued to Pennsylvania consumers containing unapproved non-guaranteed illustrated value tables. According to MetLife, this occurred with all life and annuity policies issued from the Johnstown, Pennsylvania office since 1988.

- FINDINGS AND CONCLUSIONS -

In summation of the above findings, a total of four hundred thirty-six thousand five hundred forty-seven (436,547) unapproved policy forms were issued to Pennsylvania consumers. Section 354 of the Insurance Company Law (40 P.S.477b) specifically states it shall be unlawful for any insurance company doing business in the Commonwealth of Pennsylvania to issue, sell, or dispose of any policy or contract covering life insurance or annuities until the forms have been submitted to and formally approved by the Insurance Commissioner.

It should be noted that during the course of the examination MetLife cooperated fully in providing the Insurance

Department with all requested documents, and beginning inquiries into the various consumer complaints which surfaced during the examination in order to determine necessary corrective action required to make damaged consumers whole.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON,
JOYCE ARMBRUSTER, and
DEBORAH K. SPAMER,

Plaintiffs,

VS. Case No. 93-1849-Civ-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

ORDER WITH RESPECT TO CLASS CERTIFICATION, NOTICE, AND SETTLEMENT HEARING

Before the Court is the parties' "Joint Motion for an order Certifying Proposed Settlement Class, Preliminarily Approving Proposed Settlement, Approving Notice and Setting Fairness Hearing" (Doc. 35), filed on April 12, 1994. On April 19, 1994, the Court conducted a hearing on the motion. The plaintiffs, on behalf of themselves and a putative class, and Metropolitan Life Insurance Company ("MetLife") have agreed to a settlement and compromise of this action upon the terms set forth in the

Settlement Agreement attached as Exhibit 1 to the motion. Upon consideration of the motion, the settlement agreement, the supporting memoranda, other relevant documents, and the presentation of the parties at the hearing, the motion (Doc. 35) is GRANTED. Accordingly,

IT IS HEREBY ORDERED that:

1. A settlement class consisting of

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993,

is hereby certified under Rule 23(b)(3), Fed. R. Civ. P., solely for the purpose of settlement.

2. W. Christian Hoyer and Judy S. Hoyer of James, Hoyer, Newcomer & Skye, P.A., and Ron Parry of Arnzen, Parry & Wentz, P.S.C., are designated as settlement class counsel.

3. The settlement evidenced by the Settlement

Agreement is sufficiently reasonable, adequate, and fair to warrant notice to the members of the settlement class and a full hearing on the settlement, and the Court hereby preliminarily approves the settlement.

4. A hearing shall be held before this Court at 10:00 a.m. on Monday, July 18, 1994, in Courtroom E, United States Courthouse, 611 North Florida Avenue, Tampa, Florida 33602-4520, to consider the fairness, reasonableness, and adequacy of the Settlement Agreement and whether it should be approved by the Court.

5. Individual Notice and a Proof of Claim in substantially the form annexed as Exhibits A and B to the Settlement Agreement shall be mailed on or before May 2, 1994 to those persons identified in Paragraph 9 of the Settlement Agreement. A publication notice substantially in the form annexed to the Settlement Agreement as Exhibit C shall be published in USA Today, New York Daily News, Los Angeles Times, Chicago Sun-Times, Philadelphia Inquirer, Pittsburgh Post Gazette, Birmingham News, Atlanta Constitution, Tampa Tribune, Miami

Herald, American Journal of Nursing, and RN Magazine, on or before May 9, 1994 (or as soon thereafter as the periodicals publication schedule permits), and again on or before May 14, 1994 (or as soon thereafter as the periodicals publication schedule permits) except American Journal of Nursing and RN Magazine as to which no second publication is required.

6. Notice given in the form and manner provided in Paragraph 5 of this order is hereby found to constitute the most effective and practicable notice under the circumstances of the pendency of the class action, proposed settlement, and settlement hearing to all class members who can be identified through reasonable effort, and to constitute due and sufficient notice for all other purposes to all persons entitled to receive notice required by due process and Rule 23 of the Federal Rules of Civil Procedure.

7. MetLife and settlement class counsel shall file proof of the mailing and publication of notice at or before the settlement hearing.

8. In order to be entitled to participate in the settlement, if it is approved, a member of the class must file a

Proof of Claim in the manner set forth in the Settlement Agreement so that it is postmarked no later than June 30, 1994. Any member of the class who does not file a timely and valid Proof of Claim and does not timely request to be excluded from the class shall not be entitled to share in the proceeds of this settlement but nonetheless shall be bound by the judgment and release in this action as set forth in the Settlement Agreement.

9. All members of the class who wish to exclude themselves from the class shall do so by mailing, by first class mail, a timely and valid request for exclusion to the Claims Administrator, at the address set forth in the Notice, postmarked on or before June 13, 1994. If the settlement is approved, any and all class members who do not exercise their right to be excluded from the class shall be bound by all proceedings, orders, and judgments in this action.

10. Any member of the class who did not elect to exclude himself or herself from the class may appear at the hearing, in person or by counsel, and be heard in support of or in opposition to the settlement, or any part of it. Any member of the

class who wishes to appear for the purpose of objecting to the settlement shall file on or before June 13, 1994, a notice of intention to appear and a written statement of the basis for the objection, along with all other papers or briefs he or she wishes the Court to consider. These papers shall be filed with the Clerk of the Court, United States District Court, Middle District of Florida, Tampa Division, with copies of all filed papers served, in person or by mail, on Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022, att. Lorna G. Schofield, Esq., and Arnzen, Parry & Wentz, P.S.C., 600 Greenup Street, P.O. Box 472, Covington, Kentucky 41012, att: Ron Parry, Esq. Any member of the class who does not timely file and serve a written objection shall not be permitted to raise the objection, except for good cause shown, and any member of the class who fails to object in the manner prescribed herein shall be deemed to have waived, and shall be foreclosed from raising, any objection.

11. Each class member who wishes to appear through separate counsel and/or to address the fairness, reasonableness, or adequacy of this Settlement Agreement shall serve on settlement

class counsel and counsel for MetLife and file with the Court on or before June 13, 1994, a notice of intention to appear and/or object, together with copies of any papers the settlement class member intends to present to the Court in connection with the Settlement Agreement, or be forever barred from separately appearing and/or objecting.

12. MetLife and settlement class counsel shall serve on each other and on all other parties who have filed a notice of appearance and file with the Court on or before June 28, 1994, any further documents in support of the settlement agreement, including responses to any papers filed by settlement class members.

13. MetLife and settlement class counsel, or their designated agent shall rent a post-office box in the name of the Clerk of the Court, to be used for receiving requests for exclusion and the Proofs of Claim and for other communications, and only MetLife, settlement class counsel and their designated agents shall have access to this post-office box.

14. MetLife and settlement class counsel shall establish, with court approval, a means to administer the settlement

and process Proofs of Claim.

15. Settlement class counsel shall promptly furnish counsel for MetLife with copies of any and all Proofs of Claim or written requests for exclusion that may come into settlement class counsels possession.

16. In the event the settlement is not approved by the Court or the approval does not become final pursuant to the terms of the settlement, or for any reason the settlement is terminated or does not become effective, then the settlement shall become null and void and of no further force and effect, and shall not be used or referred to for any purpose whatsoever. In such event, the class certification, settlement, and all negotiations and proceedings relating thereto shall be withdrawn without prejudice as to the rights of any and all parties thereto who shall be restored to their respective positions prior to the execution of the settlement.

17. The Court hereby reserves the right to adjourn the hearing without further written notice.

ORDERED in Tampa, Florida, on April 22nd, 1994.

Steven D. Merryday
United States District Judge

Metropolitan Life Insurance Litigation
Claims Administrator
P.O. Box 9372
Garden City, N.Y. 11530-9372
1-800-566-6365

MET Must be Postmarked
No Later Than
June 30, 1994

MET

PROOF OF CLAIM FORM

IMPORTANT: DO NOT complete this form if you wish to keep your MetLife whole life insurance policy, or if you have mailed a letter requesting to be excluded from the class in this case.

Please show any corrections here.

Name and Address

Daytime phone

Policy Number

Tax ID Number

(Social Security Number

or Employer 10 Number) This is a:

Social Security Number OR Employer ID Number

I am the sole owner of the policy identified above, OR

I own the policy jointly with other(s) (Please list below).

**I hereby certify that each of the following statements is true:**

I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

At or prior to the time that I made the purchase, I received from a MetLife representative a written or other sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time that I bought it.

Please attach a copy of any such literature if you still have it, If you have done so, check here.

If you wish to add a statement that further describes the misleading sales solicitations by MetLife representative(s), you may do so here or you may add additional pages.

Please check ONE of the following:

A. If you have a policy and your premiums are paid to date:

I request a CASH refund. *OR* I request an ANNUITY (I understand that I will be sent a description of the annuity and forms to complete.)

I understand that if I request a cash refund or an annuity, the whole life policy identified in this Proof of Claim Form will be cancelled and there will be no further benefits or protection under that policy as of June 30, 1994.

*OR*

B. If your policy has lapsed or been surrendered, then your only option is to receive a cash refund. To request one please check:

Please check ONE of the following boxes: I request a CASH refund.

I have ENCLOSED my original policy. I cannot enclose my original policy because (explain why).

RELEASE

I hereby expressly agree that I will not now or hereafter institute, maintain or assert against Metropolitan Life Insurance Company or its predecessors, successors, parents, subsidiaries, partners, corporate affiliates, successors in interest and assigns, together with the respective past, present and future officers, directors, employees, agents or representatives of any or all of them, either directly or indirectly ("MetLife"), on their own behalf or on behalf of any other person, and do hereby release MetLife from any and all causes of action, claims, damages, equitable and legal relief, demands or rights that have been or could have been asserted by me, my predecessors, successors, affiliates, heirs, administrators, executors, successors in interest, agents and assigns, in the *Sherry Horton v. Metropolitan Life Insurance* Co. action or that have been, could have been, may be or could be alleged or asserted against MetLife now or hereafter, on the basis of, connected with, arising out of, or related in whole or in part to any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, asserted, described, set forth or referred to in the above action or related to the sales solicitation or purchase of the whole life policy described

above.

I understand that this claim is being filed as part of a Court action, and I recognize that filing a false Proof of Claim Form in Court could subject me to penalties that might be imposed on me by the Court.

I certify that I am not subject to backup withholding. (If you have been notified by the IRS that you are subject to backup withholding, strike out the previous sentence.)

**IMPORTANT:** If policy is owned by two or more joint owners, all joint owners must sign.

Date:

_____ _____ _____

SIGNATURE of Owner Type or print name

SWORN TO or affirmed before me

this __ day of _____, 1994 _____ Notary Public

_____ _____ _____

SIGNATURE of Joint Owner (if any) Type or print name

SWORN TO or affirmed before me

this __ day of _____, 1994 _____ Notary Public

If the Claimant is other than an individual, or if the Claimant is not the person completing this form, the following must also be provided: